87-941

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No.

in the Supreme Court of the United States

OCTOBER TERM, 1987

CITIBANK, N.A.,

Petitioner,

v.

DATA LEASE FINANCIAL CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether state law may impose the duty to manage a national bank upon persons beyond the bank's directors when the National Bank Act specifically invests the bank's board of directors with the ultimate responsibility for the management of a national bank.

2. Whether a pledgee of corporate stock, in possession of the stock certificates, may be held liable for a decline in the underlying value of the stock, absent proof that the pledgee acted with the specific intent to deplete the collateral's value.

PARTIES TO THE PROCEEDING

Petitioner is Citibank, N.A.

Respondents are Data Lease Financial Corporation, Edward Grafton, William Krusen, Andrew Machata, Robert Marlin, R. Dale Melching, MGIC Indemnity Corporation, Truman Skinner, and Joseph Stefan.

DESIGNATION OF CORPORATE RELATIONSHIPS

A list of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of Petitioner Citibank, N.A., and of each such corporation, is included in the Appendix which accompanies this Petition at A-102.[1]

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[1]References to Citibank's Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed contemporaneously herewith, are cited herein as "A-____."

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Citibank, N.A. ("Citibank"), requests that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 828 F.2d 686 (11th Cir. 1987) and is set out in the Appendix to this Petition at A-1. The orders of the district court granting summary judgment to Citibank were entered on January 8, 1986, and March 21, 1986, and are included in the Appendix at

A-35 and A-59, respectively. The United States Court of Appeals for the Fifth Circuit has rendered an opinion in this case, reported at 645 F.2d 333 (5th Cir. 1981); the opinion is not pertinent to this Petition.

JURISDICTION

The opinion of the court of appeals for which certiorari is sought was entered on September 28, 1987. 828 F.2d 686 (11th Cir. 1987). A-1. On November 3, 1987, the court of appeals denied the petition for rehearing and suggestion of rehearing *in banc* filed by Citibank. A-74.

This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C.A. § 1254(1) (West 1966). The Petition is timely under 28 U.S.C.A. § 2101(c) (West 1982) and Rules 20.2 and 20.4 of this Court.

STATUTES INVOLVED

The National Bank Act provides in pertinent part as follows:

> *The affairs of each association shall be managed by . . . [its] directors. . . .*

12 U.S.C.A. § 71 (West Supp. 1987) (emphasis added).

> [A] national banking association . . . *shall have power —*
>
> *To exercise by its board of directors,* subject to law, all such incidental powers as shall be necessary to carry on the business of banking . . . .

12 U.S.C.A. § 24, Seventh (West Supp. 1987) (emphasis added).

STATEMENT OF THE CASE

Petitioner Citibank brought this action in 1978, in the Southern District of Florida, to foreclose upon 80.2% of the capital stock of Miami National Bank ("Miami National"). The stock was pledged by respondent, Data Lease Financial Corporation ("Data Lease"), to secure loans of $6.2 million made to it by Citibank in 1973. Data Lease defaulted on its obligations in July, 1974, and remained in default at all times thereafter.

Data Lease filed a counterclaim against Citibank and a third party complaint against former directors of Miami National alleging that the Miami National directors mismanaged Miami National, resulting in an overall decline in the underlying value of the Miami National stock. Data Lease contends that Citibank is vicariously liable for the actions of the Miami National directors.[2]

Data Lease's claims against Citibank are predicated upon certain changes in management at Miami National which occurred in 1975. The changes were precipitated by severe problems uncovered during examinations of Miami National by the federal regulators. In early 1975, national bank examiners expressed shock and alarm at Miami National's

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[2]The first three counts of Data Lease's counterclaim and third party complaint, directed against both Citibank and the Miami National directors, claim conversion (Count I), fraud (Count II), and negligence (Count III). Counts IV and V assert claims only against Citibank, based upon the Uniform Commercial Code.

financial condition and called into question the competence of Miami National's management. The examiners concluded that the future well-being of Miami National, under management elected by Data Lease, appeared questionable.

On May 16, 1975, five Miami National directors resigned from the board subsequent to the execution of a memorandum of understanding between Citibank and Data Lease. Eight other directors, all elected by Data Lease prior to May, 1975, remained on the board. The remaining board members selected third party defendants Joseph Stefan and Truman Skinner to fill vacant seats created by the resignations, and elected Joseph Stefan as president and chairman of the board.

Data Lease alleges that Citibank "took control" of Miami National by "installing its directors and officers" in May, 1975, and by re-electing those people in 1976, 1977, and 1978. Based upon such purported "control," Data Lease contends that Citibank can be held vicariously liable for any mismanagement by the directors of Miami National, and any resulting decline in the underlying value of the pledged Miami National stock.[3]

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[3]Beginning in 1976, Citibank exercised its right under the 1973 pledge agreement entered between Data Lease and Citibank to vote the Miami National stock it held as collateral. Only two of the third party defendant directors were Citibank nominees; the remaining five were Data Lease's designees. There was no relationship whatsoever between Citibank and the majority of the board of directors of Miami National, other than the fact that Citibank voted for them after their first having been installed on the Miami National board by Data Lease.

In early 1986, the district court entered several orders granting Citibank summary judgment on its complaint and on Data Lease's counterclaim. A-35, A-59. The district court correctly determined that the National Bank Act precluded Citibank from being held vicariously liable for the actions of the Miami National directors, when acting in their capacity as directors of Miami National. A-41-42,60. Additionally, the district court entered summary judgment because Data Lease failed to demonstrate that Citibank acted with the specific intent to depreciate the underlying value of the pledged Miami National stock. Relying on the opinion of the United States Court of Appeals for the Fifth Circuit in *Empire Life Insurance Co. of America v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972), the district court determined that Data Lease could not support its claims under the Uniform Commercial Code ("U.C.C."). A-67.

On April 4, 1986, the district court entered its final judgment of foreclosure from which Data Lease appealed. A-71. The United States Court of Appeals for the Eleventh Circuit reversed the district court's summary judgment by its opinion rendered September 28, 1987. A-1. In so doing, the Eleventh Circuit ignored the plain language of the National Bank Act investing the power to manage Miami National only in the bank's board of directors. In the first decision of its kind, the Eleventh Circuit applied state law and ruled that persons beyond the bank's board of directors can bear ultimate legal responsibility for the management of a national bank. A-16. The opinion is in direct conflict with the National Bank Act.

Additionally, the Eleventh Circuit reversed the summary judgment entered in favor of Citibank on Data Lease's U.C.C. claims. The court of appeals

held that summary judgment on these claims was error, stating that there was evidence in the record tending to show that Citibank "install[ed] and maintain[ed] incompetent individuals in positions of management at Miami National" and that Citibank "blithely allowed [the Miami National directors] to deplete the value of the pledged collateral." A-28-29. The decision directly conflicts with the Fifth Circuit's opinion in *Empire Life* which requires Data Lease to demonstrate that Citibank acted with the *specific intent* to depreciate the underlying value of the Miami National stock.

Citibank petitioned the Eleventh Circuit for rehearing and filed a suggestion for rehearing *in banc*. A-76. On November 3, 1987, the petition and suggestion were denied. A-74.

REASONS FOR ALLOWING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE NATIONAL BANK ACT.

The Eleventh Circuit's decision holds for the first time that a person beyond the director of a national bank can be ultimately responsible for the management of a national bank. Applying Florida agency law, which in this case directly conflicts with the National Bank Act, the court of appeals mistakenly concludes that a third party can be vicariously liable for director mismanagement of a national bank. The National Bank Act specifically provides that a national bank shall be managed by its directors. 12 U.S.C.A. §§ 24, 71 (West Supp. 1987) Thus, it is the bank's board of directors which bears ultimate responsibility for the bank's management, as a matter of federal law. It is the Act alone — and not state law — which directs who has the ultimate responsibility for the management of a national bank.

It is well settled that Congress alone has the authority to regulate and control national banks. *E.g., Easton v. Iowa,* 188 U.S. 220, 231-34 (1903). National banks are instruments of the federal government "designed to be used to aid the government in the administration of an important branch of the public service." *Farmers' & Mechanics' Nat'l Bank v. Dearing,* 91 U.S. 29, 33-34 (1875); *Van Reed v. People's Nat'l Bank,* 198 U.S. 554, 555 (1905); *Davis v. Elmira Sav. Bank,* 161 U.S. 275, 284-85 (1896). Congressional authority over national banks is paramount. *First Nat'l Bank v. Missouri,* 263 U.S. 640, 656 (1924).

State law may not conflict with the operation of a national bank and state law which infringes upon the functions of a national bank is void. *Davis,* 161 U.S. at 283. This Court has recognized that general state legal authority applicable to private corporations is often inapplicable to national banks because the latter are "created for public and national purposes." *See Easton,* 188 U.S. at 229. In *Davis,* this Court declared that:

> [A]n attempt by a state to define [national banks'] duties or control the conduct of their officers is void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created.

161 U.S. at 283; *accord Easton,* 188 U.S. at 231-34; *Farmers' & Mechanics',* 91 U.S. at 33-34. It is irrelevant whether the state law evolves from legislative or judicial action. *Van Reed,* 198 U.S. at 555.

The clear provisions of the National Bank Act, and not the intricacies and inconsistencies of the laws of fifty individual states, govern the method by which national banks are managed. The Act provides "a complete system for the management of national banks." *Cook County Nat'l Bank v. United States*, 107 U.S. 445, 448 (1883).

Sections 24 and 71 of the National Bank Act mandate that a national bank be managed solely by its board of directors. 12 U.S.C.A. §§ 24, 71 (West Supp. 1987). The bank's directors may delegate to subordinates certain management functions. Under the Act, however, it is the board which bears ultimate legal responsibility for the bank's management. *See* 12 U.S.C.A. § 93(a) (West Supp. 1987) (holding each director liable to any person who has sustained damages as a result of the director's violation of the Act).

In *Briggs v. Spaulding*, 141 U.S. 132 (1891), this Court recognized the board's ultimate responsibility for the management of a national bank and stated:

> [W]e hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision . . . .

Id. at 165.

The principle was recognized in *Gibbons v. Anderson*, 80 F. 345 (W.D. Mich. 1897), where the court explained:

> [C]ongress had some substantial purpose when, in addition to the provision for executive officers, it further provided for a board of directors to manage the bank and administer its affairs. . . . The idea is not to be tolerated that they serve as merely gilded ornaments . . . to enhance [the bank's] attractiveness, or that their reputations should be used as a lure to customers. What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely.

Id. at 350.

Thus, Congress has promulgated strict standards for membership on the board of a national bank. Every director must be a United States citizen. 12 U.S.C.A. § 72 (West Supp. 1987). Two-thirds of the board members must live within the state in which the national bank is located, or within 100 miles of its location. *Id.* Every director is required to own capital stock in the national bank "to induce him to be vigilant in protecting the bank's interests." *Cupo v. Community Nat'l Bank & Trust Co.*, 324 F. Supp. 1390, 1393 (E.D.N.Y. 1971) (interpreting 12 U.S.C. § 72). Each director must take an oath that he will diligently perform his duties, and that he possesses the qualifications essential for his position. 12 U.S.C.A. § 73 (West 1945).

The unambiguous provisions of the National Bank Act make clear that Miami National's directors, as a matter of law, were solely responsible for the bank's management. It was improper for the Eleventh Circuit to attempt to engraft an exception to the plain language of the Act, as this Court has recently recognized. *Langley v. FDIC*, 56 U.S.L.W. 4026, 4028 (U.S. Dec. 1, 1987). Conflicting state law may not be applied to affect the plain meaning of the statute. The unequivocal language of the National Bank Act controls, and any change in its import is purely a matter for Congress. *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 563 (1963).

Ironically, while the Eleventh Circuit's decision purportedly relies upon principles of common law, its conclusion is untenable under the common law's basic tenets. It is axiomatic that wherever one may be vicariously liable for the acts of another, there exists a concomitant right to supervise and control the acts of that individual. *See, e.g., Nelson v. Shell Oil Co.*, 396 So. 2d 752 (Dist. Ct. App.), *petition for review denied*, 407 So. 2d 1104 (Fla. 1981); *Variety Children's Hosp., Inc. v. Perkins*, 382 So. 2d 331 (Fla. Dist. Ct. App. 1980). Citibank had no right to supervise or control Miami National's directors, and therefore cannot be vicariously liable for the directors' acts.[4] Moreover, because Citibank had no power to manage Miami National, it could not have delegated that responsibility to Miami National's directors. Elementary principles of agency law make clear that a principal cannot delegate to an agent authority to do that which the principal cannot do

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[4]Indeed, the Eleventh Circuit recognized that any agreement whereby Citibank was authorized or required to control Miami National would be illegal and void. A-32.

for himself. *See, e.g., Phillips Petroleum Co. v. Peterson*, 218 F.2d 926 (10th Cir. 1954), *cert. denied*, 349 U.S. 947 (1955); *Connecticut v. Tedesco*, 175 Conn. 279, 397 A.2d 1352 (1978); *J.H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587, 596-97 (D.C. 1973); *Boatright v. City of Jacksonville*, 334 So. 2d 339 (Fla. Dist. Ct. App. 1976); *In re Dean*, 167 Pa. Super. 92, 74 A.2d 538 (1950); *see generally* RESTATEMENT (SECOND) OF AGENCY § 7 comment a (1958) (there is no authority to enter legal relation sought to be created by an agent unless the principal had the capacity to enter the legal relation); 2A C.J.S. *Agency* § 144 (1972) ("an agent cannot do what the principal himself cannot honestly or lawfully have done"); 3 AM. JUR. 2D *Agency* § 2 (1962) ("The fundamental idea of agency has its conception in some thing lawful that a person can do and a delegation by such person to another of the power lawfully to do that thing").

The Eleventh Circuit's decision ignores the paramount authority of the National Bank Act. The opinion undercuts the Act's provisions relating to bank management, and leaves each state to determine who bears ultimate responsibility for the management of national banks within its borders. It would relegate the legal status of national bank directors to "figureheads" or "gilded ornaments." The opinion conflicts with the provisions of the National Bank Act and should not be allowed to stand.

II. THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION REGARDING THE DUTIES OF A PLEDGEE OF COLLATERAL IN DIRECT CONFLICT WITH A DECISION OF THE FIFTH CIRCUIT.

The Eleventh Circuit's opinion directly conflicts with the only other decision of a court of appeals discussing the duty of a pledgee of stock to preserve its underlying value. The decision suggests that Citibank, as pledgee of the Miami National stock, could be held liable for a decline in the underlying value of the stock resulting from mismanagement by directors elected and re-elected by Citibank, even though there was no evidence or allegation that Citibank acted with the specific intent to depreciate the value of the stock collateral. The opinion suggests that Data Lease can recover upon its U.C.C. claims simply upon a showing that Citibank was negligent, and that its negligence contributed to a decline in the value of the collateral. A-27-29.

The decision directly conflicts with the Fifth Circuit's opinion in *Empire Life Insurance Co. of America v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972), the very case upon which the Eleventh Circuit seeks to rely. *Empire* holds that a pledgee of stock, in control of the company represented by the stock, cannot be held liable for a decline in value of the stock held as collateral in the absence of a specific intent to depreciate the value of the stock with the dishonest purpose of acquiring the stock at forced sale. 468 F.2d at 335-36. Both decisions are of great import because they construe the duty owed by a pledgee, pursuant to U.C.C. § 9-207, a provision which has been adopted in 49 states and the District of Columbia.[5]

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[5]U.C.C. § 9-207 (1978) provides in part:

(1) a secured party must use reasonable care in the custody and preservation of collateral in his possession.

(footnote continued on next page)

Both the Eleventh Circuit and Fifth Circuit opinions quote and adopt the law as set out in *Ritchie v. McMullen*, 79 F. 522 (6th Cir.), *cert. denied*, 168 U.S. 710 (1897). Unlike in *Empire*, however, the Eleventh Circuit opinion omits and departs from the key language of *Ritchie* regarding the duty of care of a pledgee of stock in regard to the underlying value of the stock:

> [T]he fact that the pledgee of stock controls the company represented by the stock does not eliminate its duty not to deplete the collateral intentionally. The general rule [is that]:
>
> > The bailee owes a direct duty to the pledgor to be reasonably careful that no harm shall come through his custody to the subject-matter of the pledge . . . *It is true that the obligations of the pledgee of stock to the pledgor would not be violated by the pledgee if the stock held in pledge suffered a loss in value through negligence of the pledgee in acting as director of the company or through ill-advised or negligent voting of other stock owned by him. . . .* But, if such pledgee use his position as director and his vote as stockholder *intentionally to depreciate the stock of his pledgor held in pledge with the dishonest purpose of acquiring ownership of the stock at forced sale,*

It has been uniformly held that a secured party's duty is to exercise reasonable care in regard to the physical preservation of collateral in its possession. *See, e.g., Capos v. Mid-America Nat'l Bank*, 581 F.2d 676 (7th Cir. 1978). The Eleventh Circuit and Fifth Circuit decisions are the only two courts of appeals' decisions which construe the extent of any duty owned by a pledgee voting the pledged shares, or in control of the corporation whose shares were pledged.

> this is a direct injury done by him to his pledgor . . . .

Empire, 468 F.2d at 335-36 (quoting *Ritchie*, 79 F. at 533-34) (emphasis added).

Under *Empire*, neither mismanagement nor negligent voting by the pledgee in control of the corporation represented by the pledged stock gives rise to an action by the pledgor against the pledgee. Rather, *specific intent* to deplete the underlying value of the collateral, with a dishonest purpose of acquiring ownership, is essential to any such cause of action. *Accord FDIC v. Webb*, 464 F. Supp. 520, 526 (E.D. Tenn. 1978) (holding that a pledgor, seeking to recover under U.C.C. § 9-207 for a decline in the value of stock collateral, must show that the pledgee acted with the specific intent to depreciate the underlying value of the pledged stock).

The Eleventh Circuit reversed the summary judgment entered in Citibank's favor because it concluded there was evidence in the record tending to show that Citibank "installed[ed] and maintain[ed] incompetent individuals in positions of management at Miami National" or "blithely allowed these individuals to deplete the value of the pledged collateral". A-28-29. Under *Empire*, however, Data Lease has no claim against Citibank because specific intent is an essential element of Data Lease's claims.

The Eleventh Circuit's opinion not only creates a conflict between circuits, but will serve to discourage, if not eliminate, cooperation between secured lenders and troubled debtors. There has long been "a legitimate and customary practice of keeping an oversight by a creditor over the business, management, and operations of a debtor of doubtful sol-

vency." *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1105 (5th Cir. 1973) (quoting *Chicago Mill & Lumber Co. v. Boatmen's Bank*, 234 F. 41, 46 (8th Cir. 1916)); *see also Ritchie*, 79 F. at 551. If liability is imposed upon a pledgee for mismanagement by a board of directors or for negligent voting, absent a showing of specific intent by the pledgee to depreciate the underlying value of the pledged stock, no secured lender will be inclined to assist a troubled debtor in a workout situation. Rather than risk exposure to such liability, in a business climate where difficult business decisions necessarily will be made, a lender will have little choice but to slam the door on the struggling borrower. Clearly, the Eleventh Circuit's decision should not be allowed to stand.

CONCLUSION

For the reasons stated herein, petitioner, Citibank, N.A., requests that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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EDITOR'S NOTE

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CITIBANK, N.A., Plaintiff-Counterclaim Defendant, Third-Party Defendant-Appellee,

v.

DATA LEASE FINANCIAL CORPORATION, Defendant-Counterclaim Plaintiff, Third Party Plaintiff-Appellant,

v.

Joseph STEFAN, Truman A. Skinner, R. Dale Melching, William A. Krusen, Robert M. Marlin, Andrew Machata, Edward G. Grafton, MGIC Indemnity Corporation, Third-Party Defendants-Appellees.

No. 86-5324.

United States Court of Appeals, Eleventh Circuit.

Sept. 28, 1987.

Pledgee of controlling block of stock in bank brought foreclosure action, and pledgor filed counterclaim, naming members of board of directors of bank as third-party defendants. The United States District Court for the Southern District of Florida, No. 78-5747 Civ-LCN, Lenore Carrero Nesbitt, J., entered summary judgment in favor of pledgee on all claims and counterclaims, and pledgor appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) under Florida law, whether pledgee of controlling block of stock in corporation had agency relationship with members of corporation's board of directors allegedly installed by pledgee, so that pledgee could be held vicariously liable to pledgor was issue of fact; (2) pledgor could bring direct action against members of board of directors of

bank, rather than being required to bring suit derivatively in name of bank; and (3) whether pledgee used its power as controlling shareholder in bank to install and maintain incompetent individuals in management positions at bank, and whether pledgee allowed such individuals to deplete value of stock, were issues of fact precluding summary judgment.

Reversed and remanded.

1. Federal Civil Procedure ⇦ 2487

Under Florida law, whether pledgee of controlling block of stock in bank had agency relationship with members of corporation's board of directors, who allegedly were installed by pledgee pursuant to provision of pledge giving pledgee absolute right to vote pledged shares upon default, so that pledgee could be held vicariously liable to pledgor for alleged interference with pledgor's right in pledged stock, mismanagement, and conversion was issue of fact, precluding summary judgment, in light of turnover agreement under which pledgee agreed that it would "select, install, oversee, and supervise" members, and other evidence that members worked closely with pledgee on "major matters."

2. Corporations ⇦ 320(4)

Whenever plaintiff sues in stockholder capacity for corporate mismanagement, he must bring suit derivatively in name of corporation.

3. Corporations ⇦ 320(4)

Policy supporting rule forbidding direct shareholder suits against management is most compelling when plaintiff is similarly situtated to other shareholders, suffers same injury, and retains same oppor-

tunity to be made whole by corporate recovery from wrongdoer.

4. Corporations ⇦ 123(13), 320(4)

Whenever pledgee of stock in corporation installs its agents on board of directors of corporation, agents owe pledgor same direct duty as agents owe pledgee, which duty arises from pledge agreement and is independent of fiduciary duties owed to pledgor as shareholder, and thus, pledgor may bring direct cause of action against pledgee's agents whom pledgee has placed in control of the corporation, rather than being required to assert rights derivatively through corporation.

5. Federal Civil Procedure ⇦ 2487

Whether pledgee of stock in bank induced pledgor to participate in plan under which pledgor would retain ownership and control of bank while pledgee called shots in background and whether pledgee suffered any injury as a result of participation in arrangement were issues of fact, precluding summary judgment on pledgor's fraud claims against pledgee and members of bank's board of directors allegedly installed by pledgee.

6. Corporations ⇦ 123(13)

Pledge agreement did not authorize alleged conduct by pledgee of stock in bank in inducing pledgor to participate in plan under which pledgor would retain ownership and ostensible control of bank while pledgee called shots in background, but, rather, only by gaining pledgor's consent to such arrangement could pledgee be assured of firm control of bank, for purpose of determining whether

pledgor was induced to take action that it was not already obligated to take, under terms of pledge agreement, by alleged fraudulent representations by pledgee.

7. Corporations ⇦ 123(13)

General rule that pledgee who has no control over corporation cannot be held responsible for dip in price of stock does not apply when pledged stock represents controlling interest and pledgee becomes involved in management of corporation. U.C.C. §§ 9-207, 9-207 comment; West's F.S.A. §§ 679.207(1, 3), 679.501(2).

8. Federal Civil Procedure ⇦2487

Whether pledgee of controlling stock in bank used its power as controlling shareholder in bank to install and maintain incompetent individuals in management positions at bank, whether pledgee allowed such individuals to deplete value of stock, and whether pledgee deprived pledgor of possession and use of stock for unreasonable length of time without applying stock or proceeds from sale of stock toward liquidation of debt were issues of fact, precluding summary judgment as to claim by pledgor that pledgee breached its duty of reasonable care under Florida statutes. U.C.C. §§ 9-207, 9-207 comment; West's F.S.A. §§ 679.207(1, 3), 679.501(2).

9. Limitation of Actions ⇦127(8)

Claims by pledgor of controlling block of stock in bank against pledgee and members of bank board of directors allegedly installed by pledgee regarding violations of federal and Florida RICO laws were based substantially on same conduct as set forth in

previous pleadings alleging fraud and mismanagement of pledged assets, and thus, RICO claims added in amended complaint related back to original complaint, for limitations purposes, even though original complaint did not allege criminal conviction of one member of board for alleged activities. U.C.C. § 1-101 et seq.; 18 U.S.C.A. §§ 1961-1968; West's F.S.A. §§ 671.203, 679.501-679.507, 895.01-895.09; Fed. Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.

10. Federal Civil Procedure ⇦2487

Issues of fact regarding terms of alleged turnover agreement under which pledgee of stock in bank allegedly gained control of bank from pledgor precluded summary judgment as to legality of turnover agreement.

11. Equity ⇦65(2)

Even assuming that aspects of turnover agreement under which pledgor of stock in bank allegedly turned over control of bank to pledgee violated public policy, resulting illegality would fall far short of wrongful conduct necessary to taint pledgor with unclean hands so as to bar pledgor from seeking equitable relief, including specific performance.

Robert M. Sondak, Paul, Landy, Beiley & Harper, P.A., Miami, Fla., Larry Klein, Klein & Beranek, West Palm Beach, Fla., for Data Lease Financial Corp.

Marc Cooper, Cooper, Wolfe & Bolotin, Karen A. Gievers, Anderson, Moss, Russo, Gievers & Cohen, Miami, Fla., Joseph Stefan.

Joel S. Perwin, Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, Miami, Fla., for Robert Marlin.

John H. Schulte, Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, Miami, Fla., for Citibank, N.A.

R. Thomas Farrar, Holland & Knight, Miami, Fla., for Joseph Stefan, Truman Skinner, R. Dale Melching, William Krusen, Robert Marlin, Edward Grafton, Andrew Machata and MGIC Indem. Corp.

Glenn J. Waldman, Sparber, Shevin, Shapo, Heilbronner & Book, Miami, Fla., for First American Bank & Trust.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge,
VANCE, Circuit Judge, and
PITTMAN*, Senior District Judge.

VANCE, Circuit Judge:

This case concerns a loan of more than $6.2 million that Data Lease Financial Corporation ("Data Lease") received from Citibank, N.A. ("Citibank"). When Data Lease could not repay this loan, Citibank commenced this action seeking judicial sale and a deficiency judgment. Data Lease asserted affirmative defenses, counterclaims and third party claims based on the alleged mismanagement of the pledged assets. This appeal is from the lower court's entry of summary judgment in favor of Citibank on all claims and counterclaims.

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*Hon. Thomas V. Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

I. *Statement of Facts*

On April 12, 1973, Citibank loaned $6.2 million to Data Lease. The collateral securing this loan included 870,000 shares — 80.2% — of the capital stock of Miami National Bank ("Miami National").[1] The pledge agreement expressly provided that, upon any default by Data Lease, Citibank had the absolute and exclusive right to vote the pledged shares of Miami National. Between April, 1973 and May, 1974, Data Lease borrowed an additional $670,000 from Citibank. Data Lease defaulted on these obligations by failing to make installment payments due July 12, 1974, and subsequently remained in default.

In October, 1974, the Supreme Court of Florida ruled that a third entity, Blackhawk Heating & Plumbing Company, Inc. ("Blackhawk"), had properly exercised an option to purchase 217,500 shares of the Miami National stock owned by Data Lease and pledged to Citibank. *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.*, 302 So.2d 404 (Fla.1974). The Florida Supreme Court reinstated an injunction restraining Data Lease from conveying any of the 870,000 shares of Miami National Stock. *Blackhawk Heating & Plumbing Co. vs. Data Lease Fin. Corp.*, 328 So.2d 825, 826 (Fla.1975). As a result of these rulings, it was impossible to sell the pledged stock without first reaching some accommodation with Blackhawk.

In early 1975, bank regulators called into question Miami National's financial soundness and the competence of its management. The Regional Admin-

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[1] The collateral also included 35,138 shares of First American Bank & Trust which are not relevant to our discussion of the issues in this case.

istrator of National Banks notified Miami National's board of directors that he was "shocked and alarmed" at the financial condition of the bank and that "the future well-being of [Miami National] appear[ed] questionable." The Miami National board of directors decided that the chairman of the board, Roy Talmo, could no longer participate in the bank's management. Talmo was also the chairman of Data Lease.

On May 16, 1975, five Miami National directors, including Talmo, resigned from the board pursuant to an agreement ("the turnover agreement") embodied in a memorandum of understanding signed by Citibank. Eight other directors, all elected by Data Lease prior to May, 1975, remained on the board. The remaining board members selected third party defendants Joseph Stefan and Truman Skinner to fill vacancies created by the resignations and elected Stefan as president and chairman of the board. Beginning in 1976, Citibank exercised its right under the pledge agreement to vote the Miami National stock it held as collateral. Citibank utilized these rights to reduce the number of directors from eleven to six and then voted the pledged shares to elect the entire board.

In December, 1978, Citibank finally settled Blackhawk's claim and, having received no payment from Data Lease, brought this foreclosure action in the district court. On February 29, 1979, the court ordered an emergency judicial sale of the pledged Miami National stock. This sale was held on Febru-

ary 7, 1979, and Citibank purchased the stock for $3 million.[2]

Following the sale, the parties filed numerous pleadings and motions. Data Lease alleged twelve affirmative defenses to foreclosure. These defenses were premised upon the 1975 turnover agreement and Citibank's control of the individuals installed on the Miami National board of directors. Data Lease alleged that these individuals brought about a dramatic decline in the value of Miami National stock through their mismanagement.

Data Lease also named these individuals as third party defendants in its counterclaim.[3] Count I of the counterclaim alleged conversion of the pledged stock. Specifically, Data Lease claimed that Citibank and the third party defendants misused the pledged property and denied Data Lease access to information concerning their mismanagement. Count II alleged that Citibank fraudulently induced Data Lease to enter the 1975 turnover agreement. Count III alleged that the pledge agreement and the turnover agreement established a bailment relationship between Citibank and Data Lease and further alleged that Citibank and the third party defendants negligently breached their duties with regard to the bailed property.

Counts IV and V were grounded in the Uniform Commercial Code ("U.C.C.") and only stated claims

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[2] The order confirming this purchase was appealed and affirmed. *Citibank, N.A. v. Data Lease Financial Corp.*, 645 F.2d 333 (5th Cir. 1981).

[3] The individuals named as third party defendants are Stefan, Skinner, Robert Marlin, Dale Melching, Andrew Machata, Edward Grafton, and William Krusan.

against Citibank. Data Lease alleged that Citibank failed to use reasonable care in the custody and preservation of the pledged Miami National stock, in violation of Fla.Stat. §§ 679.501-.507 and § 671.203.

On June 27, 1985, Data Lease amended its counterclaim to add three additional counts. Counts VI and VII alleged that Citibank and third party defendant Stefan had violated the federal RICO statute, 18 U.S.C. §§ 1961-68 and the Florida RICO statute, Fla.Stat. §§ 895.01-.09.[4]

On January 8, 1986, the district court entered an order granting partial summary judgment to Citibank and the third party defendants on three threshold issues. First, the district court ruled that Data Lease could not hold Citibank vicariously liable for the actions of the third party defendants because the Miami National directors were not in an agency relationship with Citibank. The court also determined that Data Lease had no cause of action against the Miami National Directors themselves because such claims could only be brought in a stockholder derivative suit and Data Lease no longer owned Miami National stock. Finally, the district court held that the 1975 turnover agreement was unenforce-

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[4] An additional claim, Count VIII, alleged that Citibank and third party defendants Stefan and Skinner had violated the Florida civil theft statute, Fla.Stat. § 812.014, by backdating the registration of the pledged Miami National stock. The district court dismissed this count under the doctrine of collateral estoppel after finding that the issue had been extensively litigated in the Florida state courts. *See Citibank N.A. v. Data Lease Fin. Corp.*, 478 So.2d 76 (Fla.Dist.Ct.App. 1985); *Blackhawk Heating and Plumbing Co. v. Data Lease Fin. Corp.*, 446 So.2d 127 (Fla.Dist.Ct.App.1983). On appeal, Data Lease has not addressed the district court's disposition of its civil theft claim and has thus abandoned Count VIII.

able and could not be interposed as a defense against foreclosure.

In addition to deciding these three threshold issues, the district court held that a five year statute of limitations barred Counts VI and VII, Data Lease's RICO claims.

Beginning in February, 1986, the district court entered a series of orders that effectively eliminated the remainder of Data Lease's counterclaims and affirmative defenses. The court granted summary judgment in favor of Citibank on the claims for conversion and negligent bailment, Counts I and III, because its threshold rulings eliminated the Miami National directors as defendants and foreclosed the possibility that Citibank might be liable for the actions of these individuals. In addition, the district court granted summary judgment on the fraud claim, Count II. While noting that Citibank, as pledgee of the Miami National stock, had a duty to physically preserve the stock certificates, the court held that Citibank had no duty to preserve their underlying value. Therefore the court granted summary judgment on the U.C.C. claims, Counts IV and V. The district court similarly rejected the corresponding affirmative defenses, and, on April 9, 1986, the court entered a final judgment of foreclosure for the principal sum of $7,182,373.65 and interest in the amount of $11,182,241.83. We reverse on all counts.

II. *The Conversion and Negligent Bailment Claims Against Citibank and the Third Party Defendants*

Data Lease alleges that Citibank installed individuals on the Miami National board of directors

who interfered with Data Lease's rights in the pledged stock and misused the bank to the point where its resulting deterioration in value amounted to conversion. Data Lease also claims that this mismanagement breached the common law duties a bailee owes a bailor with respect to bailed property. The district court did not reach the merits of these claims.[5] Rather, the court made two threshold rulings that left Data Lease without anyone to sue.

[1] First, the court held that Citibank was not liable for the wrongful actions of the third party defendants because they were not the agents of Citibank while acting in their capacity as Miami National directors. Second, the court held that Data Lease did not have a direct cause of action against the third party defendants because any such action would belong to the corporation, rather than an individual shareholder. Since Data Lease had lost ownership of its Miami National stock as a result of the foreclosure sale, Data Lease could no longer bring suit against these defendants derivatively in Miami National's name. We hold that both of these rulings are incorrect.

An agency relationship "results from the manifestation of consent by one person to another that

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[5] The district court also held that Data Lease's common law claim of negligent bailment, as alleged in Count III, was superseded by the more specific U.C.C. remedy sought under Count IV. Our disposition of Data Lease's U.C.C. claims would appear to diminish the significance of this issue to the outcome of the present lawsuit. For the present, we leave this question open because of its potential importance and because the parties have inadequately briefed the subject. No cases have been brought to our attention indicating how a Florida court would dispose of this issue.

the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1 (1958). The district court concluded that there was no agency relationship between Citibank and the third party defendants because the 1975 turnover agreement between Citibank and Data Lease was illegal. Regardless of the legality of the turnover agreement, however, a relationship did exist between Citibank and the third party defendants. The issue therefore remains whether these individuals were Citibank's agents.

> It is well settled under Florida law that, [t]he existence of an agency relationship, the nature and extent of the agent's authority, and the inclusion within the scope of that authority of a particular act are ordinarily questions to be determined by the jury or by the trier of facts in accordance with the evidence adduced in the particular case.

Financial Fire & Cas. Co. v. Southmost Vegetable Co-op. Ass'n, 212 So.2d 69, 71 (Fla.Dist.Ct. App.1968) (citing *American Can Co. v. Horlamus Corp.*, 341 F.2d 730 (5th Cir.1965)); *see also Borg-Warner Leasing v. Doyle Elec. Co.*, 733 F.2d 833, 836 (11th Cir.1984), *cert. denied* — U.S. — , 106 S.Ct. 1790, 90 L.Ed.2d 336 (1986); *Birmingham Fire Ins. Co. of Pa. v. Moss Manufacturing, Inc.*, 446 So.2d 1142 (Fla.Dist.Ct.App.1984); *Scott v. Sun Bank of Volusia County*, 408 So.2d 591, 598 (Fla.Dist.Ct.App.1981). Data Lease need not point to an express agreement in order to establish that an agency relationship existed between Citibank and the third party defendants. *Harrell v. Branson*, 344 So.2d 604, 607 (Fla.Dist.Ct.App), *cert. denied*, 353 So.2d 675 (Fla.1977). Rather, the

agency relationship may be inferred from circumstantial evidence or implied from a course of dealings. *Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys.*, 669 F.2d 1026, 1035 (5th Cir. Unit B 1982); *Harrell*, 344 So.2d at 607; *Lan-Chile Airlines, Inc. v. Rodriguez*, 296 So.2d 498, 500 (Fla.Dist.Ct.App.1974), *cert. denied*, 310 So.2d 305 (Fla.1975). This principle holds true even when the principal and agent deny the relationship. *See Cleveland Compania Maritima, S.A. Panama v. Logothetis*, 378 So.2d 1336, 1338 (Fla.Dist.Ct.App.1980); *McCabe v. Howard*, 281 So.2d 362, 363 (Fla.Dist.Ct.App.1973).

In determining whether an agency relationship exists between Citibank and the third party defendants, the key issue is control and domination. *See Mercury Cab Owners' Ass'n v. Jones*, 79 So.2d 782, 784-85 (Fla.1955); *Folwell v. Bernard*, 477 So.2d 1060, 1063 (Fla.Dist.Ct.App.1985), *cert. denied*, 486 So.2d 595 (Fla.1986); *Sapp v. City of Tallahassee*, 348 So.2d 363, 367 (Fla.Dist.Ct.App.), *cert. denied*, 354 So.2d 985 (Fla.1977); *National State Bank of Newark v. Robert Richter Hotel, Inc.*, 188 So.2d 18, 19 (Fla.Dist.Ct.App.), *cert. denied*, 194 So.2d 624 (Fla.1966); *King v. Young*, 107 So.2d 751, 753 (Fla.Dist.Ct.App.1958).[6] In his deposition, Joseph Stefan made the following admission:

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[6] "[C]ontrol and domination need not be actual but may be binding upon the principal if apparent." *Sapp v. City of Tallahassee*, 348 So.2d 363, 367 (Fla.Dist.Ct.App.), *cert. denied*, 354 So.2d 985 (Fla.1977); *cf. Seaboard Properties, Inc. v. Bunchman*, 278 F.2d 679, 682 (5th Cir.1960) ("authority of the agent may be real or apparent"); *Taco Bell of California v. Zappone*, 324 So.2d 121, 123 (Fla.Dist.Ct.App.1975). If the purported principal represents to a third person that an agency relationship exists and the third person relies upon this rela-

Q. Did you work for Citibank?

A. At the bottom of everything the answer would be yes. They put me there and they took me out.

Stefan further testified that he worked in close coordination with Citibank on "major matters", including major changes of policy.[7] Finally, Stefan described his displeasure with Miami National's head of operations and his inability to remove the man from office:

Q. Why couldn't you get rid of Mr. Connor?

A. He was there at the wishes of Citibank and they would have to remove him.

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tionship to his detriment, then the principal is estopped from denying the agency relationship. *See, e.g., Borg-Warner Leasing v. Doyle Elec. Co.*, 733 F.2d 833, 836 (11th Cir.1984), *cert. denied*, — U.S. —, 106 S.Ct. 1790, 90 L.Ed.2d 336 (1986); *Orlando Executive Park, Inc. v. Robbins*, 433 So.2d 491, 494 (Fla.1983); *Mercury Cab Owners' Ass'n v. Jones*, 79 So.2d 782, 784 (Fla.1955); *Sapp v. City of Tallahassee*, 348 So.2d at 367; Restatement (Second) of Agency §8B (1958). On the other hand, it is important to remember that this doctrine "rests on appearances created by the principal and not agents who often ingeniously create an appearance of authority by their own acts." *Smith v. American Auto. Ins. Co.*, 498 So.2d 448, 449 (Fla.Dist.Ct.App.1986) (quoting *Taco Bell v. Zappone*, 324 So.2d 121, 124 (Fla.Dist.Ct.App. 1975)).

In the present case, the counterclaim alleges that Citibank agreed in the 1975 turnover agreement that it would "select, install, oversee, and supervise" Stefan and the other third party defendants. Regardless of the agreement's legality, a jury could find that its terms are additional evidence of Citibank's actual or apparent control over the third party defendants.

[7] A common purpose or design may constitute additional evidence of agency. *See McCabe v. Howard*, 281 So.2d 362, 363 (Fla.Dist.Ct.App. 1973).

Indeed, the district court found itself bound to observe that,

> In opposition to the motion [for summary judgment], DATA LEASE has presented deposition testimony and exhibits tending to show that the Third Party Defendants were agents of CITIBANK as they were chosen by Citibank to fill the MNB directorships, and as CITIBANK controlled their activities during their tenure on the board.

Yet inexplicably, the court went on to hold as a matter of law that no agency relationship existed and that Citibank could not be vicariously liable for the actions of the third party defendants. This is error. *See, e.g., Cirou v. Basler*, 432 So.2d 628, 629 (Fla.Dist.Ct.App.1983); *McCabe v. Howard*, 281 So.2d at 363.[8]

[2] A more difficult issue is whether Data Lease has a direct cause of action against members of the Miami National board of directors. It is an established rule that whenever a plaintiff sues in a stockholder capacity for corporate mismanagement, he must bring the suit derivatively in the name of the corporation. *See Empire Life Ins. Co. of America v. Valdak Corp.*, 468 F.2d 330, 335 (5th Cir.1972); *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968).

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[8] Data Lease must also convince the trier of fact that the acts of which it complains were within the scope of the agency relationship. *See Hudak v. Economic Research Analysts, Inc.*, 499 F.2d 996, 1002 (5th Cir.1974), *cert. denied*, 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 821 (1975); *Cirou v. Basler*, 432 So.2d 628, 629 (Fla.Dist.Ct.App.1983).

> The reason for this rule is, that each shareholder suffers relatively in proportion to the number of shares he owns and each will be made whole if the corporation obtains compensation or restitution from the wrongdoer. If each shareholder could sue individually for his losses, the wrongdoer would be subject to "as many suits . . . as there were stockholders in the corporation."

Empire Life, 468 F.2d at 335 (quoting *Sutter v. General Petroleum Corp.*, 28 Cal.2d 525, 170 P.2d 898 (1946)). In addition, requiring derivative enforcement of claims belonging to the corporation prevents individual shareholders from incurring a benefit at the expense of other, similarly situated shareholders. *See Cowin v. Bresler*, 741 F.2d 410, 414 (D.C.Cir.1984) (citing 13 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 5915, at 323 (rev. perm. ed. 1980).

[3] Thus, the policy supporting the rule forbidding direct shareholder suits against management is most compelling when the plaintiff is similarly situated to other shareholders, suffers the same injury, and retains the same opportunity to be made whole by a corporate recovery from the wrongdoer. *See Cowin v. Bresler*, 741 F.2d at 414 (quoting *Bokat v. Getty Oil Co.*, 262 A.2d 246, 249 (Del.1970) and *Empire Life*, 468 F.2d at 335). On the other hand, the logic of the rule is least persuasive when, as in the present case, these circumstances are all absent. *Cf. Citizens National Bank of St. Petersburg v. Peters*, 175 So.2d 54, 56 (Fla.Dist.Ct.App.1965) ("a stockholder may bring a suit in his own right to redress an injury sustained directly by him, and

which is separate and distinct from that sustained by other stockholders.")

When a shareholder pledges his stock to a pledgee who assumes control of the corporation, he is no longer similarly situated to the other shareholders. While the other shareholders can bail out at will, the pledged stock is held captive to the whims of the pledgee. This is the very situation that arose in *Empire Life*, where this court noted that the pledgee could "use his position as director and his vote as stockholder intentionally to depreciate the stock of his pledgor held in pledge with the dishonest purpose of acquiring ownership of the stock at forced sale." 468 F.2d at 336. Unlike the remaining shareholders, who may bring a derivative action, the pledgor loses his opportunity to share in a corporate recovery after a foreclosure sale.[9] For these reasons, the *Empire Life* court held that the pledgee in *Empire Life* directly injured his pledgor,

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[9] A shareholder may not bring a derivative action once he parts with his shares. *See Schilling v. Balcher*, 582 F.2d 995, 1001-02 (5th Cir.1978). As a general rule, the shareholder also does not have a direct cause of action:

> [W]e have specifically ruled that a stockholder cannot recover for a personal loss by asserting and proving that the defendants' wrongdoing has caused him to sell his corporate stock at a depressed value, for by the very act of selling at a lower price he has established that the direct damage was to corporate worth. The loss in his stock's sale price is a real economic harm to him, but is both indirect to and duplicative of the corporation's right of action.

Mendenhall v. Fleming Co., 504 F.2d 879, 881 (5th Cir.1974); *see also Martens v. Barrett*, 245 F.2d 844 (5th Cir.1957); *Peter v. Western Newspaper Union*, 200 F.2d 867 (5th Cir.1953).

> "and [could not] avoid direct liability to his pledgor for [the injury], by pleading that the means by which he accomplished this wrong and violated his duty as pledgee, involved an injury to the corporation, for which it may also recover damages." [T]he defendant seeks damages as a *pledgor*. The fact that his pledge is stock and that if the manipulated depreciation of the stock is proven would also give rise to a derivative suit by defendant as *stockholder* should not foreclose the suit as pledgor. The role of pledgor and stockholder are not identical and defendant may play the part he chooses . . . We find that the defendant . . . is entitled to bring his claim as individual pledgor.

Empire Life, 468 F.2d at 336 (quoting *Ritchie v. McMullen*, 79 F. 522 (6th Cir.), *cert. denied*, 168 U.S. 710, 18 S.Ct. 945, 42 L.Ed. 1212 (1897) and citing 12A W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 5649, at 413-18) (emphasis in original).

[4] The issue in *Empire Life* was whether the pledgor could proceed directly against the pledgee. The issue in the present case is whether a pledgor can proceed directly against third parties whom the pledgee has installed on a corporation's board of directors. Nevertheless, we think that whenever a pledgee of stock installs its agents on the board of directors, these agents owe the pledgor the same

direct duty as the pledgee.[10] This duty arises from the pledge agreement and is independent of the fiduciary duties owed to the pledgor as shareholder. *See Cowin v. Bresler*, 741 F.2d at 415; *Empire Life*, 468 F.2d at 335-36.[11] The same policy considerations — the potential for abuse of the collateral, the

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[10] The lower court refused to find such a duty because of the general rule to the contrary:

> An agent who intentionally or negligently fails to perform duties to his principal is not thereby liable to a person whose economic interests are thereby harmed.

Restatement (Second) of Agency § 357 (1958); *see also Suzuki v. Gateway Realty of America*, 207 Neb. 562, 299 N.W.2d 762, 766 (1980); *Bescor, Inc. v. Chicago Title & Trust Co.*, 113 Ill.App.3d 65, 68 Ill.Dec. 812, 815, 446 N.E.2d 1209, 1212 (1983); *Merriman v. Smith*, 599 S.W.2d 548 (Tenn.Ct.App. 1979).

This rule, however, has not prevented the Florida courts from extending an agent's duty from his principal to a third party where circumstances warrant. *See, e.g., First American Title Ins. Co. v. First Title Service Co.*, 457 So.2d 467, 473 (Fla.1984) ("Where the abstracter knows, or should know, that his customer wants the abstract for the use of a prospective purchaser, and the prospect purchases the land relying on the abstract, the abstracter's duty of care runs...not only to his customer but to the purchaser"); *Robinson v. John E. Hunt & Assoc.*, 490 So.2d 1291, 1293 (Fla.Dist.Ct.App.1986) (injured party may sue tortfeaser's insurance agent for negligence in failing to provide adequate insurance to the tortfeaser).

[11] Our result is therefore consistent with the case law in this circuit holding that a shareholder need not assert his rights through the corporation if he can show the violation of a duty owed directly to him. *Empire Life*, 468 F.2d at 335; *Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. Unit B 1981); *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968); *see also Cowin v. Bresler*, 741 F.2d at 415; *Buschmann v. Professional Men's Ass'n*, 405 F.2d 659, 662 (7th Cir.1969); *Eden v. Miller*, 37 F.2d 8 (2d Cir.1930).

relative helplessness of the pledgor, and the inadequacy of other remedies — which militate in favor of allowing a direct cause of action against a pledgee, also require us to allow a direct cause of action against the pledgee's agents whom the pledgee has placed in control of the corporation.

The district court disposed of the conversion and negligent bailment claims through an incorrect application of the law. Data Lease must have the chance to prove the merits of these claims at trial.

III. *The Fraud Claims Against Citibank and the Third Party Defendants*

[5] Data Lease claims that Citibank and the third party defendants employed fraudulent statements to deceive Data Lease into entering the 1975 turnover agreement under which Data Lease relinquished control of Miami National. According to the deposition testimony of several witnesses, Citibank promised that it would assist Miami National in obtaining deposits, loans and loan participants, and that Citibank would furnish experts to improve Miami National's performance. Citibank also assured Data Lease that it would select a new management team consisting of experienced and competent managers.[12]

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[12] Citibank claims that a promise to do something in the future cannot support an action for fraud. Florida law, however, treats a promissor's intent as a material existing fact. *See Bissett v. Ply-Gem Industries*, 533 F.2d 142, 145 (5th Cir.1976). Accordingly, Data Lease may recover for such a misrepresentation if it shows that the promissor either lacked the intention to perform the promise or specifically intended not to perform at the time the representation was made. *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092,

Data Lease further claims that the fraud continued once Citibank and the third party defendants gained control of Miami National. These additional misrepresentations took the form of glowing reports concerning the financial condition of Miami National and the competency of its new management team. For example, when Data Lease learned that Miami National had made a disastrous series of loans approximating $5,000,000, a Citibank officer reassured Data Lease that its concerns were overblown. This same officer testified that he had earlier refused to involve Citibank in the same project.

> I turned it down on both form and substance. This was a project that had a very jaded past, which was sufficient reason to turn it down out of hand. In addition, as has been discussed here, I didn't think the principals were acceptable as borrowers.

The Citibank officer placed Data Lease in touch with Truman Skinner, a new Miami National director. Allegedly, Skinner falsely stated that the comptroller of currency had approved the loans and misrepresented Miami National's liability as minimal.

Under Florida law, the essential elements of a claim for fraudulent misrepresentation include: 1) a false statement concerning a specific material fact; 2) a showing that the representer knew, or should have known, that the representation was false; 3) an intention that the representation induce another to act on it; and 4) consequent injury to the

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1104 (11th Cir.1983); *Bissett*, 533 F.2d at 145; *Alexander/Davis Properties, Inc. v. Graham*, 397 So.2d 699, 706 (Fla.Dist.Ct.App.), *cert. denied*, 408 So.2d 1093 (Fla.1981).

party acting in justifiable reliance on the representation. *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1103 (11th Cir.1983); *Bissett v. Ply-Gem Industries, Inc.*, 533 F.2d 142, 146 (5th Cir. 1976). The district court granted summary judgment for Citibank and the third party defendants because it could discern no injury suffered by Data Lease acting in reliance upon the alleged misrepresentations.

The district court reasoned that Citibank, as a secured creditor, could assume all rights to the Miami National stock after default, and could have either taken control of the bank by voting the stock pursuant to the pledge agreement or sold the stock — all without the consent of Data Lease. As a result, the district court concluded that Data Lease gave up nothing when it allowed Citibank and the third party defendants to assume control of Miami National.

Data Lease, however, has adduced evidence to the contrary. Citibank apprehended great difficulties in foreclosing on the Miami National stock because the Florida Supreme Court had reinstated an injunction restraining Data Lease from conveying any of its Miami National shares. *See Blackhawk Heating & Plumbing Co. v. Data Lease Financial Corp.*, 328 So.2d 825 (Fla.1975). Citibank's counsel advised that a foreclosure sale could render Data Lease insolvent and force it to seek the protection of a bankruptcy court. In an internal memorandum dated March 31, 1975, a Citibank vice president concluded:

> Given the summary of alternatives on the disposition of our loan by Shearman & Sterling it seems that both Alternative I — Voluntary Sale of Miami National Bank and Alternative II —

Citibank foreclosure on MNB and subsequent sale, appear to contain significant problem areas, (the injunction and Data Lease Bankruptcy) which preclude our following these alternatives.

The memo went on to propose that Citibank offer Data Lease time and cooperation in exchange for placing new management in the bank so the stock could be sold for a higher value at a later date.

Citibank also concluded that it would be unable to assume control by voting the stock at the March 21, 1975 stockholders meeting. In his deposition, Citibank's counsel John Roche explained:

> I was always concerned, because of the Bank Holding Company Act, that Citibank should not take control of the Miami National Bank, and took some care in the [turnover agreement] to see that it did not take control within the meaning of the act.... I think [operational control, day-to-day management] was rejected and instead the solution was a voluntary change in some of the directors and the CEO of MNB, acceptable to the board, with the retention of directors from the old slate and without putting in Citibank people into MNB.
>
> * * *
>
> Q. What was the problem with the Bank Holding Company Act with Citibank taking control?
>
> A. At the time, the statute provided a two-year period for the acquisition of stock or control, and after that two-year period, there would have to be divestiture of the stock or relinquishment of control within the meaning of

the act. I didn't want the period to begin running.

Q. Why?

A. Because in discussions with the business people, it looked as if it would take a longer period of time to work out the problems. Miami National Bank was a very, very sick bank.

This deposition testimony along with other evidence indicated that, at least in 1975, Citibank believed that it could not accomplish its objectives without Data Lease's cooperation.

[6] Citibank bargained hard for this cooperation.[13] The district court nevertheless concluded that

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[13] Stefan gave the following testimony concerning an extensive series of discussions between Citibank and Data Lease:

Q. And did you hear any statements made to Mr. Talmo by way of leaning on him to agree to step down in your favor?

A. I did get that impression.

* * *

Q. What type of leaning did [Mr. Roche] do at that meeting?

A. Generalization that there would be consequences if this fine course of action that they were describing were not implemented.

Q. What type of consequences did he allude to?

A. I can't say specifically, but they were not the kind of things that would be pleasing to Data Lease.

Q. Did you come away from that meeting with the impression that Mr. Roche and Mr. Mapel were conveying to Mr. Talmo that the full weight of the institution, of Citibank, was leaning on Mr. Talmo?

A. Mr. Sondak, that would be overbearing. If you put the whole weight of Citibank on Mr. Talmo he would become a beetle.

Q. How much pressure would you say Mr. Mapel and Mr. Roche applied to Mr. Talmo?

Data Lease took no action that it was not already obligated to take under the terms of the pledge agreement and thus could not recover against Citibank. *See, e.g., Betterton v. First Interstate Bank of Arizona, N.A.*, 615 F.Supp. 72, 74 (E.D.Mo.1985) ("no recovery in fraud for a deception by which a person is induced to do something which he is already bound to do"), *rev'd on other grounds*, 800 F.2d 782 (8th Cir. 1986). This conclusion is erroneous. The evidence suggests that Citibank induced Data Lease to participate in a plan where Data Lease would retain ownership and ostensible control of Miami National while Citibank called the shots in the background. The pledge agreement did not contemplate such an arrangement; only by gaining Data Lease's consent to the turnover agreement could Citibank be assured of firm control.

The district court was also wrong to conclude, as a matter of law, that Data Lease suffered no injury as a result of its participation in this arrangement. The resulting change in management was catastrophic for Miami National, with the value of the pledged stock declining dramatically. It is true that Citibank could have taken control of the bank without Data Lease's consent and that Data Lease may have suffered the same injury even if it had refused its cooperation. On the other hand, there is evidence that Citibank had temporarily abandoned this option. Indeed, Citibank did not begin exercising its voting rights to the pledged shares until September, 1976. A jury could conclude that, but for Data Lease's cooperation with Citibank, Miami National would have been spared at least one year of the

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A. Just enough to accomplish their purpose.

mismanagement that occurred under Citibank's tutelage.

It is irrelevant whether Citibank and its counsel correctly analyzed the law or whether Citibank had additional options which it failed to consider. If Citibank would not have assumed control of Miami National without the cooperation of Data Lease, this cooperation constitutes detrimental reliance. Data Lease is entitled to prove at trial that Citibank obtained this cooperation by fraudulent misrepresentations.[14]

IV. *The U.C.C. Claims Against Citibank*

Section 9-207 of the Uniform Commercial Code specifies a pledgee's duties with respect to the pledged collateral. Section 679.207(1), Florida Statutes, provides:

> A secured party must use reasonable care in the custody and preservation of collateral in his possession.

This duty applies "when the secured party has possession of the collateral before default, as a pledgee, and also when he has taken possession of the collat-

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[14] A jury could also find that the misrepresentations continued once Citibank and the third party defendants assumed control of Miami National and that Data Lease detrimentally relied on these additional representations. A Data Lease officer gave the following testimony at deposition:

> I think our problem was if the misrepresentation caused us not to take action, if the — if [Skinner] would have told us the truth at the time, there were many things that we could have done then rather than later. I think we eventually did file a mismanagement suit in Palm Beach County but by that time it was maybe Fall of 1978 . . . .

eral after default." U.C.C. § 9-207 comment 4; *see also* Fla.Stat. § 679.501(2). A secured party is liable for any loss caused by his failure to meet this standard of care. Fla.Stat. § 679.207(3).[15]

The district court held that Citibank had discharged this duty of reasonable care because Citibank "physically preserved" the paper certificates representing Miami National stock. Indeed, the general rule is that,

> a pledgee's duty with regards to the care of the pledge chattel is confined solely to the physical care of the chattel and a pledgee is not liable for a decline in the value of pledge instruments.

See Tepper v. Chase Manhattan Bank, N.A., 376 So.2d 35, 36 (Fla.Dist.Ct.App.1979). This rule is based on the common sense notion that a pledgee who has no control over a corporation cannot be held responsible for a dip in the price of stock.

[7,8] For this reason, the law makes an exception when the pledged stock represents a controlling interest and the pledgee becomes involved in the management of the company. *See Empire Life Ins. Co. of America v. Valdak Corp.*, 468 F.2d at 335. As the pledgee enters this new arena, its duty of reasonable care follows it and attaches to all its activities. *Id.* In the present case, Data Lease has adduced evidence that Citibank used its power as controlling shareholder to install and maintain incompetent individuals in positions of management at Miami Na-

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[15] Count IV alleges a breach of Citibank's duties under Fla.Stat. § 679.207. Count V alleges a breach of the duty to act in a commercially reasonable manner, Fla.Stat. §§ 679.501-.507, and a breach of the covenant of good faith which the U.C.C. imposes on all contracts, Fla.Stat. § 671.203.

tional. Additional evidence suggests that Citibank blithely allowed these individuals to deplete the value of the pledged collateral. We conclude that a jury could find that these actions constituted a breach of Citibank's statutory duty of reasonable care.[16]

V. *The RICO claims*

[9] In 1985, the district court allowed Data Lease to amend its counterclaim and third party complaint so as to allege violations of federal and Florida RICO laws. On motion for summary judgment, the court noted that all of the actions giving rise to the RICO claims occurred while Stefan was chairman of the Miami National board of directors, a position he held until 1978. Thus, the relevant statute of limitations had expired. *See* Fla.Stat. § 895.05(10); *Agency Holding Corp. v. Malley-Duff & Assoc.*, — U.S. — , 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987). The court held that the RICO claims would not relate back because they were based on new facts. This conclusion is erroneous.

Fed.R.Civ.P. 15(c) governs the relation back of amendments to pleadings. This rule provides:

> Whenever the claim or defense asserted in the amended pleadings arose out of the conduct,

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[16] Data Lease also argues that Citbank breached its duty of good faith by holding the pledged collateral for an unreasonable period of time without electing between sale and retention. We agree that it is unfair for a creditor "to deprive the debtor of the possession and use of the collateral for an unreasonable length of time and not apply the asset or the proceeds from its sale toward liquidation of the debt." *Ayares-Eisenberg Perrine Datsun, Inc. v. Sun Bank of Miami*, 455 So.2d 525, 528 (Fla.Dist.Ct.App.1984). This is also a question for the jury.

transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Counts VI and VII alleged that Citibank and Stefan engaged in a pattern of racketeering activity through which they acquired and maintained control of Miami National and manipulated the conduct of the bank's affairs. These claims are grounded on Citibank's misrepresentations to Data Lease and communications to Miami National urging that significant sums of money be loaned to questionable people for dubious projects. These additional allegations of mail and wire fraud are therefore based substantially on the same conduct set forth in the previous pleadings.

Nevertheless, Citibank argues that the additional claims do not relate back because the original complaint did not specifically allege criminal activity. We disagree. We can find no reason to enforce a statute of limitations when the respondents had notice from the beginning that Data Lease would be trying to enforce claims arising from this course of conduct. *See Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 581, 65 S.Ct. 421, 424, 89 L.Ed. 465 (1945). We conclude that the effect of the amendment to the pleadings was to "facilitate a fair trial of the existing issues." *Id.*[17]

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[17] One fact not previously alleged is the criminal conviction of Stefan for these activities. At the time the amended pleading was filed, it was the law in the Southern District of Florida that a necessary element of a RICO cause of action was a prior criminal conviction. *See, e.g., Atlantic Federal Savings & Loan of Ft. Lauderdale v. Dade Savings & Loan Ass'n*, 592 F. Supp. 1089, 1093 (S.D.Fla.1984). The Supreme Court has re-

VI. *The Affirmative Defenses*

[10] Data Lease's thesis is that the parties substituted a new contract for the original pledge agreement and that this new contract was the 1975 turnover agreement.[18] Several of Data Lease's affirmative defenses center on allegations that Citibank breached or waived the provisions of this new agreement. In addition, Data Lease asserts traditional equitable defenses to specific performance.

The turnover agreement is evidenced in part by a memorandum of understanding executed by Data Lease and Citibank on April 22, 1975. In this document, Data Lease and Roy Talmo agreed upon a procedure for replacing a majority of the Miami National board of directors with individuals "acceptable to Citibank." The memorandum further provided that Stefan would replace Talmo as director, chairman of the board, and president. In its counterclaim, Data Lease characterizes the turnover agreement as a contract under which "Citibank took control of and undertook to manage the business affairs of Miami National Bank." The counterclaim further alleges that Citibank represented that it would "select, install, oversee and supervise" Stefan and other Miami National personnel.

The district court reasoned that the turnover agreement was illegal because it had the effect of

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cently held that a prior criminal conviction is not an element of a RICO claim. *Sedima, S.P.R.L. v. Imrax Co.*, 473 U.S. 479, 105 S.Ct. 3275, 3284, 87 L.Ed.2d 346 (1985).

[18] Data Lease also argues that there was an accord and satisfaction of the original debt when it surrendered control of Miami National.

withdrawing from the board of directors control and direction over the corporate affairs of Miami National. As support for this proposition, the court relied upon the landmark case of *Manson v. Curtis*, 223 N.Y. 313, 119 N.E. 559 (1918). The *Manson* court described the relationship between shareholders and directors as follows:

> As a general rule, the stockholders cannot act in relation to the ordinary business of the corporation, nor can they control the directors in the exercise of the judgment vested in them by virtue of their office. . . . Directors are the exclusive, executive representatives of the corporation, and are charged with administration of its internal affairs and the management and use of its assets. Clearly the law does not permit the stockholders to create a sterilized board of directors.

119 N.E. at 562 (citations omitted); *see also McQuade v. Stoneham*, 263 N.Y. 323, 189 N.E. 234, 236 (1934) ("Directors may not by agreements entered into as stockholders abrogate their independent judgment"); *cf.* 12 U.S.C. §§ 24, 71 (National Bank Act entrusts the board of directors with the care and management of the bank's affairs). Accordingly, the district court correctly concluded that a Florida court applying *Mason* could find the 1975 turnover agreement illegal if it allowed Citibank to direct the day-to-day actions of the board of directors with respect to the ordinary business of the corporation.

At this stage of the proceedings, however, the terms of the turnover agreement are far from certain. The memorandum of understanding indicates that the purpose of the turnover agreement was to replace the old board of directors, rather than to

sterilize the new board. Indeed, *Manson* explicitly approves of this type of agreement:

> It is not illegal or against public policy for two or more stockholders owning the majority of the shares of stock to unite upon a course of corporate policy or action, or upon the officers whom they will elect. An ordinary agreement, among a minority in number, but a majority in shares, for the purpose of obtaining control of the corporation by the election particular persons as directors is not illegal. Shareholders have the right to combine their interests and voting powers to secure such control of the corporation and the adoption of and adhesion by it to specific policy and course of business.

119 N.E. at 561; *see also McQuade v. Stoneham*, 189 N.E. at 236 ("Stockholders may, of course, combine to elect directors"); *see also Glekel v. Gluck*, 30 N.Y.2d 93, 330 N.Y.S.2d 371, 372-75, 281 N.E.2d 171, 172-73 (1972) (reaffirming that stockholders can agree to control corporate policy as long as they do not "interfere directly with the normal freedom of management of the corporation by its directors and officers").

Because of the uncertainties of fact and law attending this issue, we think it inappropriate to determine the legality of the turnover agreement on a motion for summary judgment.

[11] We also reject Citibank's contention that Data Lease's participation in the turnover agreement prevents Data Lease from seeking equitable relief. Even assuming that there are aspects of the agreement that run counter to public policy, the resulting illegality falls far short of the wrongful conduct

necessary to taint Data Lease with unclean hands. *Cf. Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 819, 65 S.Ct. 993, 999, 89 L.Ed. 1381 (1945) (unclean hands doctrine justifies dismissal where "inequitable conduct impregnates...entire cause of action"); *Hensel v. Aurilio*, 417 So.2d 1035, 1038 (Fla.Dist.Ct. App.1982) (equating unclean hands with "unscrupulous practices, overreaching, concealment, trickery, [and] other unconscientous conduct condemned by honest and reasonable men").

REVERSED and REMANDED.

United States District Court
Southern District of Florida

CASE NO. 78-5747-CIV-NESBITT

CITIBANK, N.A.

Plaintiff,

vs.

DATA LEASE FINANCIAL CORPORATION, et al.,

Defendants.

OMNIBUS ORDER ON PENDING MOTIONS

THIS CAUSE is before the Court on several motions: a Motion for Partial Summary Judgment filed by Plaintiff CITIBANK N.A. (CITIBANK), a Motion for Summary Judgment filed by the Third Party Defendants STEFAN, SKINNER, MELCHING, KURSEN [sic], GRAFTON, MARLIN and MACHATA (Third Party Defendants), as well as a Motion for Summary Judgment on Liability against the Third Party Defendants filed by DATA LEASE FINANCIAL CORPORATION (DATA LEASE). Also before the Court is CITIBANK's Motion to Dismiss the Amendment to DATA LEASE's Counterclaim.

CITIBANK commenced this action on December 27, 1978 with the filing of its complaint. According to the Complaint's allegations, from 1973 through 1975 DATA LEASE obtained a series of loans from CITIBANK in excess of 6.5 million dollars, which loans were secured in part with a pledge of 870,000 shares of stock in Miami National Bank (MNB). The Complaint further alleged that DATA LEASE had defaulted under the terms of the loan agreement by failing to make timely payments of principal and interest due and CITIBANK accordingly prayed for

interim relief in the form of foreclosure of its interest in the collateral. In February 1979, a predecessor judge ordered the MNB stock collateral to be sold at an emergency judicial sale.

Following this sale, the parties filed numerous pleadings and motions which ultimately resulted in DATA LEASE's November 1980 filing of a Second Amended Answer and Affirmative Defenses and a Second Amended Counterclaim (counterclaim) against CITIBANK and a Third Party Complaint against the Third Party Defendants, former directors of MNB. These claims by DATA LEASE arose out of a pledge agreement and amendments thereto in which DATA LEASE secured its indebtedness to CITIBANK by the pledging of its MNB stock as collateral (hereinafter the "amended pledge agreement"), and a subsequent turnover agreement entered into by CITIBANK and DATA LEASE, which allowed for a change in MNB's management.

As a result of this turnover agreement between DATA LEASE and CITIBANK, a partial change in MNB's management did take place in May 1975. In September 1976, CITIBANK utilized the voting rights of DATA LEASE's pledged MNB shares and voted to reduce the number of existing directors from eleven to six. CITIBANK then voted the shares to elect six directors, all of whom are named as Third Party Defendants herein.

DATA LEASE's claim against CITIBANK and the Third Party Defendants alleges that through mismanagement, misconduct and the commission of various improper and imprudent acts CITIBANK and the Third Party Defendants caused a decline in the value of DATA LEASE's pledged MNB stock for which DATA LEASE seeks damages.

By way of summary, Count I of DATA LEASE's counterclaim alleges that actions by CITIBANK and the Third Party Defendants constituted conversion of the MNB pledged shares. These actions allegedly included denying DATA LEASE the right to vote the shares of MNB stock, denying DATA LEASE access to information concerning the management, operations and conditions of MNB, and misusing the pledged property.

In Count II of the counterclaim DATA LEASE alleges that actions by CITIBANK and the Third Party Defendants amounted to actual and constructive fraud based upon purported misrepresentations, concealments and the employment of other artifices used to deceive DATA LEASE into entering the 1975 turnover agreement, as well as additional misrepresentations made from May 1975 through December 1978 regarding CITIBANK's operation and control over MNB.

Count III of DATA LEASE's counterclaim alleges that the original 1973 pledge agreement, the 1974 amended pledge agreement and the 1975 turnover agreement established a bailment relationship between CITIBANK and DATA LEASE of the MNB pledged shares, and that CITIBANK negligently breached its duties with regard to the bailed property.

Count IV of DATA LEASE's counterclaim alleges that CITIBANK failed to use reasonable care in the custody and preservation of the pledged MNB stock, in violation of Fla. Stat. § 679.207(1). In Count V DATA LEASE alleges that CITIBANK violated the duties imposed upon it as a secured party under Fla. Stat. §§ 679.501 et seq., and § 671.203 of Florida's Uniform Commercial Code.

On June 27, 1985 DATA LEASE sought leave to file an Amendment to Second Amended Counterclaim and Third Party Complaint. At the time this case was transferred to this division of the Court[1] on August 30, 1985, twenty-one motions were pending. These pending motions included several motions for summary judgment which sought the disposition of the above summarized claims as well as DATA LEASE's Motion for Leave to File an Amendment to Second Amended Counterclaim and Third Party Complaint. This Court, in its Omnibus Order of October 11, 1985 disposed of the majority of these pending motions, and permitted DATA LEASE's Amendment of its Counterclaim and Third Party Complaint.

The amendment to its counterclaim added two counts against CITIBANK and Third Party Defendant STEFAN, alleging violations of the Federal RICO statute and Florida RICO statute (18 U.S.C. § 1961 *et seq.* and Fla. Stat. § 895.01 *et. seq.* respectively) and one count against CITIBANK and Third Party Defendant STEFAN and SKINNER, alleging violation of the Florida civil theft statute (Fla. Stat. § 812.035). The RICO counts are founded upon allegations of criminal conduct engaged in by Third Party Defendant JOSEPH STEFAN, and the civil theft claim is based on an allegation of backdating the reregistration of the pledged MNB shares in October 1977 by CITIBANK, STEFAN and SKINNER.

This case has been pending since 1978. It is still in the pre-trial pleading stage. It is apparent, however, from the plethora of memoranda encompassing

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[1] This case has been transferred to five Southern District Judges since its inception.

some 23 volumes, that the parties have fully and exhaustively presented almost every conceivable issue that has or could arise in this case to date. The Court will therefore refrain from reiterating and restating all the general propositions of law which have been so well briefed by the parties in their memoranda. Rather, the Court will address and dispose of all pending pre-trial motions based on issues raised by pleadings so that this case can move from its current pleading/discovery stage into the pre-trial/trial stage.

1. CITIBANK's Motion for Partial Summary Judgment

CITIBANK, by its motion for partial summary judgment seeks resolution of the single threshold issue of whether it can be held vicariously liable for the alleged wrongful actions of the Third Party Defendants as directors of MNB. CITIBANK asserts that it cannot, and in support thereof presents the following two propositions: first, CITIBANK contends that any provisions of the 1975 turnover agreement which would have deprived the MNB Directors of the discretion and authority over corporate matters that they were lawfully entitled to exercise would be void and unenforceable under applicable statutory and case law. Secondly, CITIBANK contends that it is factually indisputable that the Third Party Defendants did not take directions from, nor did they function as agents for CITIBANK.

In opposition to the motion, DATA LEASE has presented deposition testimony and exhibits tending

to show that the Third Party Defendants were agents of CITIBANK as they were chosen by CITIBANK to fill the MNB directorships, and as CITIBANK controlled their activities during their tenure on the board. DATA LEASE further addresses CITIBANK's claim that under common law principles any agreement which would have "sterilized the board is void" and asserts that such theory has been abrogated by statute in Florida (Fla. Stat. § 607.107(2)).

As has been summarized, DATA LEASE has in its Second Amended Answer and Affirmative Defenses and its Second Amended Counterclaim against CITIBANK raised various claims arising out of both the 1973 pledge agreement and the 1975 turnover agreement. Under the 1975 turnover agreement, according to DATA LEASE, "CITIBANK took control of and undertook to manage the business affairs of Miami National Bank," and represented that it would "select, install, oversee and supervise" the Third Party Defendant STEFAN and the other directors and management personnel of MNB.[2]

It is well settled that an agreement which would have the effect of withdrawing from directors control and direction over corporate affairs is void and illegal. Shareholders have no legal power to give binding instructions to the board of directors on matters within the board's powers. In the landmark case of *Manson v. Curtis*, 223 N.Y. 313, 119 N.E. 559 (1918) the Court recognized that it is not improper for stockholders to unite in deciding upon whom to elect as directors, but any agreement which withdraws from the board of directors the power to

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[2] Counterclaim paragraphs 10, 11(b).

direct corporate affairs and vests it in another is void and illegal. The *Manson* court summarized the nature of the relationship between shareholders and directors.

> As a general rule, the stockholders cannot act in relation to the ordinary business of the corporation, nor can they control the directors in the exercise of the judgment vested in them by virtue of their office . . . Directors are the exclusive, executive representatives of the corporation, and are charged with the administration of its internal affairs and the management and use of its assets . . . *Clearly the law does not permit the stockholders to create a sterilized board of directors.* (Emphasis supplied.)

223 at 316, 119 N.E. at 562.

See Milton Frank Allen Publications, Inc. v. Georgia Ass'n of Petroleum Retailers, 162 S.E.2d 724 (Ga. 1968); *McQuade v. Stoneham*, 263 N.Y. 323, 189 N.E. 234 (1934). Under the National Bank Act, 12 U.S.C. §§ 1-215(b), which governs the corporate organization of national banks the board of directors are an independent body entrusted with the care and management of the bank's affairs. 12 U.S.C. §§ 24, 71. Therefore, any agreements or understandings under the 1975 turnover agreement which limited or directed the actions or functions of the MNB directors are contrary to public policy and unenforceable.

DATA LEASE relies upon Fla. Stat. § 607.107(2) as being in derogation of the general rule that any agreement limiting the powers of the Board of Directors of a corporation is invalid. Fla. Stat. § 607.107(2) provides in pertinent part as follows:

> . . . no written agreement to which all the shareholders have actually assented, whether embodied in the articles of incorporation or bylaws or in any agreement in writing and signed by all the parties thereto, and which relates to any phase of the affairs of the corporation, whether to the management of its business, division of its profits, or otherwise, shall be invalid as between the parties thereto on the ground that it is an attempt by the parties thereto to restrict the discretion of the board of directors in its management of the business of the corporation . . .

Even assuming Fla. Stat. § 607.107(2) is applicable to the directors of MNB, that statute only approves agreements to restrict the discretion of the board of directors when *all* the shareholders have assented. DATA LEASE owned only 80.2% of the outstanding shares in MNB and there is no evidence that "all the shareholders actually assented" to the 1975 turnover agreement by which CITIBANK undertook to oversee and supervise the Board of Directors of MNB. Under the facts, therefore, Fla. Stat. § 607.107(2) does not apply and consequently the 1975 turnover agreement is void and unenforceable.

Based upon the foregoing, the Court finds that the Third Party Defendants were not the agents of CITIBANK while acting in their capacity as directors of MNB and thus CITIBANK cannot be held vicariously liable for their alleged wrongful actions as directors of MNB. This ruling includes any claim against CITIBANK for fraud in the inducement of the 1975 turnover agreement. It is well settled that courts will not enforce any obligation arising out of an agreement which is illegal. Thus, as the 1975 turnover agreement was invalid, DATA LEASE has

no direct cause of action against CITIBANK for fraud in the inducement. *See Schaal v. Race,* 135 So.2d 252 (Fla. 2d D.C.A. 1961); *Edward v. Trulis,* 212 So.2d 893 (Fla. 1st D.C.A. 1968); *Finley Method Co. v. Standard Asphalt Co. of Fla.,* 139 SO. 795 (Fla. 1932). Accordingly, pursuant to *Fed.R.Civ.P.* 56, CITIBANK's Motion for Partial Summary Judgment filed November 13, 1984 is GRANTED.

II. Third Party Defendants Motion for Summary Judgment and Data Lease's Motion for Summary Judgment on Liability against the Third Party Defendants

The claims against the Third Party Defendants as set forth in Count I and Count II of the counterclaim are for conversion of pledged property and actual and constructive fraud. The claims are based on allegations that the Third Party Defendants in various ways and by acts of mismanagement, misconduct, misrepresentation, misdeeds and misuse of the pledged property caused a decline in the value of DATA LEASE's pledged MNB stock.

In support of its motion, the Third Party Defendants assert several grounds. Initially, they contend that DATA LEASE does not have a direct cause of action against them arising from any alleged wrongdoings that took place while they were serving in their capacity as directors of MNB. The Third Party Defendants rely on the line of established authority which holds that claims against officers or directors of a corporation for corporate mismanagement belong only to the corporation and may be redressed by a shareholder only in a derivative action brought on behalf of the corporation. *Empire Life Insurance Co. of America v. Valdak Corp.,* 468

F.2d 330 (5th Cir. 1972); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970); *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893 (5th Cir. 1968); *Martens v. Barrett*, 245 F.2d 844 (5th Cir. 1957).

When a corporation is injured, shareholders of the corporation can be affected by the injury. Sometimes the injury to the corporation can result in a decline in the value of the corporation's stock, which decreases the value of the shareholders' investment. Even in this event, there exists no direct cause of action by shareholders for redress of the injury in such a case. As the direct injury is to the corporation, the direct cause of action belongs to the corporation and any damages recovered will go directly to the corporation.

In determining whether an action belongs to a corporation rather than an individual shareholder, the threshold analysis focuses upon the type of damages allegedly caused by the conduct of the defendant. *See Stevens v. Lowder*, 643 F.2d 1078 (5th Cir. 1981). The losses which DATA LEASE is claiming are the devaluation of the MNB stock and the loss of profits or benefits of stock ownership sustained by DATA LEASE because of its former ownership interest in MNB, which allegedly suffered the direct injury.

As was succinctly stated in the case of *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970):

> A stockholder of a corporation does not acquire standing to maintain an action in his own right, as a shareholder, when the alleged injury is inflicted upon the corporation and the

only injury to the shareholder is the indirect harm which consists of the diminution in value of his corporate shares resulting from the impairment of corporate assets. In this situation, it has been consistently held that the primary wrong is to the corporate body and, accordingly, that the shareholder, experiencing no direct harm, possesses no primary right to sue.

The *Kauffman* rationale was apparent in the earlier Fifth Circuit decision of *Martens v. Barrett*, 245 F.2d 844 (5th Cir. 1957). In the *Martens* case the Fifth Circuit held that the law prohibits a shareholder's direct action against a wrongdoer "even though in an economic sense real harm may well be sustained [by the shareholder] as the impact of such wrongful acts bring about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership." 245 F.2d at 846. *See Mendenhall v. Fleming Co.*, 504 F.2d 879 (5th Cir. 1974).

Some cases do, however, recognize an exception to the general rule and hold that a shareholder may have a direct action arising from corporate mismanagement when the alleged wrongful conduct breaches a duty owed directly to the shareholder as well as a duty owed to the corporation. In such a case, it is not enough to show that the injury flows to both the corporation and the shareholder. Some contractual or special relationship must exist between the shareholder and wrongdoers to support a direct action. *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893 (5th Cir. 1968); *Empire Life v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972).

The Court in *Empire Life v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972) summarized the general rule:

> . . . [if] a plaintiff sues in a stockholder capacity for corporate mismanagement, he must bring the suit derivatively in the name of the corporation. Schaffer v. Universal Rundle Corp., 5 Cir. 1968, 397 F.2d 893. The reason for this rule is that each shareholder suffers relatively in proportion to the number of shares he owns and each will be made whole if the corporation obtains compensation or restitution from the wrongdoer. If each shareholder could sue individually for his losses, the wrongdoer would be subject to "as many suits . . . as there were stockholders in the corporation." Sutter v. General Petroleum Corp., 28 Cal.2d 525, 170 P.2d 898 (1946).
>
> [10] There exists, however, a well-recognized exception to this general rule. Where the act complained of creates not only a cause of action in favor of the corporation but also creates a cause of action in favor of the stockholder, *as an individual*, for violation of a duty owing directly to him, the stockholder may bring suit as an individual. Buschmann v. Professional Men's Ass'n, 7 Cir. 1969, 405 F.2d 659, 661-663.

Applying this exception to the instant case, the Court finds that if in fact CITIBANK breached a duty owed directly to DATA LEASE or if DATA LEASE suffered a direct primary injury due to CITIBANK's actions, then DATA LEASE may properly bring a direct claim against CITIBANK as opposed to a derivative claim.

As to the breach of duty theory, DATA LEASE claims CITIBANK owed it direct duties by virtue of the pledge agreement between DATA LEASE and CITIBANK. According to DATA LEASE, the Third Party Defendants are agents of CITIBANK. CITIBANK owed DATA LEASE a pledgee's duty not to injure MNB and to properly care for the pledged collateral. CITIBANK breached certain duties under the pledge agreement, so the Third Party Defendants are liable to DATA LEASE.

In short, DATA LEASE's theory is that as agents, the Third Party Defendants can be personally liable for obligations and duties owed not personally by the agent but rather by its principal CITIBANK, even though the Third Party Defendants were not a party to any agreement between DATA LEASE and CITIBANK. The general rule is to the contrary and is stated as follows:

> An agent who intentionally or negligently fails to perform duties to his principal is not thereby liable to a person whose economic interests are thereby harmed.

Restatement (Second) of Agency § 357.

See Suzuki v. Gateway Realty of America, 299 N.W.2D 762, 766 (Neb. 1980) ("where an obligation is that of a principal, a court cannot enforce the obligation against the agent so long as he is merely

acting as agent") and *Bescor, Inc. v. Chicago Title & Trust Co.*, 446 N.E.2d 1209 (1983):

> an agent is not liable for injuries to third persons resulting solely from a mere breach of duty which he owes to his principal, unless at the same time the agent owes a separate duty to the third party.

446 N.E. 2d at 1212.

Thus, a principal's duty to a third person does not ordinarily create a duty between the principal's agent and that third person. Applying this rule to the instant facts, it becomes apparent that DATA LEASE must seek redress for breach of the duties created by the pledge agreement from CITIBANK, not from the Third Party Defendants.

In addition to DATA LEASE's theory that it may bring a direct action against CITIBANK because of duties owed under the pledge agreement, DATA LEASE claims that it has a direct right to action against the Third Party Defendants based on several additional theories.

In summary DATA LEASE's direct injury claims can be classified as: (1) breach of the "access agreement" by which DATA LEASE's Chairman of the Board, Roy Talmo, would be given full access to the executive committee of the MNB and the management of MNB; (2) misrepresentations by the Third Party Defendants regarding CITIBANK's involvement and control over MNB as enhancing the value of DATA LEASE's pledged collateral of MNB stock and statements made about the "Outrigger Loans"; (3) improper advice that CITIBANK was entitled to vote DATA LEASE's shares pursuant to the pledge

agreement; and (4) violations of certain national banking laws and regulations.

(1) *The Breached Access Agreement*

On May 16, 1975 an agreement was entered into between MNB and DATA LEASE under which DATA LEASE through Roy Talmo would have continued access to the information, records, and executive committee meetings of MNB. The agreement was subject to the approval of the Comptroller of the Currency. The Comptroller explicitly disapproved of the agreement and suggested in his letter certain conditions under which a future agreement might be acceptable. Shortly thereafter, the Third Party Defendants informed Talmo that the agreement had been disapproved, and that he was therefore being denied "access" to MNB. The Court finds that this failure of the Third Party Defendants to formulate an agreement which the Comptroller "would approve" does not constitute a breach of duty owed directly to DATA LEASE which would give rise to a direct action.

(2) *Misrepresentation and Fraud*

DATA LEASE claims that the Third Party Defendants breached a direct duty owed to DATA LEASE by virtue of several "specific misrepresentations." In summary DATA LEASE asserts that it received false information about (a) the quarterly statements and financial condition of MNB, (b) an "Outrigger Loan" made by MNB, and (c) the enhancement of MNB under CITIBANK's management and control.

Additionally, DATA LEASE has asserted numerous specific instances of fraudulent mistatement or

non-disclosure committed by STEFAN to induce DATA LEASE to enter into the 1975 turnover agreement. As previously determined by the Court, the 1975 turnover agreement is illegal and unenforceable, and accordingly as no claims arising from that agreement can be enforced by DATA LEASE against CITIBANK as principal, no claims can be enforced against the Third Party Defendants as "agents" of CITIBANK.

Even if the alleged fraudulent misrepresentations created a direct injury or breach of duty which would give rise to an independent rather than derivative action, which they do not, the statements made were not of past or existing fact, but of opinion or promises which are not actionable under Florida law. *Stoller v. Metropolitan Life Insurance Co.*, 287 So.2d 694 (3d D.C.A. 1974).

(3) *The Vote Denial Claim*

DATA LEASE has alleged that CITIBANK and the Third Party Defendants wrongfully denied it the right to vote its shares of MNB stock at the subject bank's 1976 and 1977 annual shareholders meeting. According to DATA LEASE, as a consequence of this denial CITIBANK successfully installed its own designees on the MNB Board, who thereafter mismanaged the bank causing its financial decline.

Assuming, arguendo, that the aforesaid denial was wrongful, it appears to this Court that the resultant injury suffered by DATA LEASE was identical to the injury suffered by all the MNB shareholders — specifically, a diminution in the value of the shares held in the bank. For the reasons stated, the Court concludes that no direct action may be maintained by DATA LEASE for this derivative injury.

(4) *Statutory Claims*

It is not clear whether DATA LEASE intended that any of the allegations contained in paragraph 25, namely allegations asserting a violation of federal banking laws and federal regulations, be asserted as separate claims in its suit.

Although *Fed.R.Civ.P.* 8 does not require a specific technical form of pleading, different causes of action should be set forth in separate counts so as to adequately notify the opposing party of the nature of the lawsuit. *Schuchart and Associates, Etc. v. Solo Serve Corporation,* 540 F.Supp. 928 (W.D. Texas 1982). This is particularly true when alleging statutory violations. *Miller v. Indiana Hospital,* 562 F.Supp. 1259 (W.D. Penn. 1983).

If DATA LEASE intended to assert a claim for violation of federal banking laws by CITIBANK, its attempts were at best, inartful, as it does not refer to 12 U.S.C. § 93 or 12 U.S.C. § 503, which sections permit, under proper circumstances, a direct cause of action by a shareholder against directors of a national bank. Rather than entertain a motion for further amendment of the pleadings at this late stage of proceedings, however, the Court will consider DATA LEASE to have alleged that 12 U.S.C. § 93 allows it a private cause of action for certain violations of Chapter 2, Title 12 of the United States Code which were alleged in paragraphs 25 (a), (b) and (i) of DATA LEASE's counterclaim. The Court will also consider DATA LEASE to have alleged that 12 U.S.C. § 503 permitted it to bring a private cause of action for violations of Chapter 3, Title 12 of the United States Code which were alleged in paragraph 25(c) of DATA LEASE's counterclaim.

Neither Section 93 nor Section 503 empower a shareholder to initiate direct causes of action with respect to any violation of federal banking law by a director of a national bank nor do the criteria of *Cort v. Ash*, 422 U.S. 66 (1970), permit such a private right of action. Therefore paragraphs 25(D), (E), (F), (G) and (H) of the amended counterclaim do not and cannot state a claim for relief. While the issue of whether DATA LEASE may maintain a private cause of action for certain violations of the National Banking Act was not discussed in detail by the parties in their voluminous memoranda, rather than prolong this matter further, the Court will consider the applicable law.

There is authority which allows a shareholder to state a direct cause of action against directors of a national bank. *Harmsen v. Smith*, 542 F.2d 496 (9th Cir. 1976). However, case law requires that the shareholder demonstrate that the damages suffered are personal to him, and the shareholder is not permitted to recover for gravaman injuries done to the bank. In this case the injury claimed by DATA LEASE is based on a loss in value of its stock allegedly due to the directors' mismanagement, misconduct and misdeeds. This is exactly the kind of wrong suffered by the corporation and may only be redressed by a derivative action.

The cases which interpret Sections 93 and 503 and allow shareholders to bring a direct cause of action against a bank generally involve contracts or other special relationships between the shareholder and the directors or the bank that sets the shareholders apart from other stockholders. *See Chesbrough v. Woodworth*, 244 U.S. 73, 37 S.Ct. 79 (1917), *Yates v. Jones National Bank*, 206 U.S. 158,

27 S.Ct. 638 (1907). In *Harmsen v. Smith*, 542 F.2d 496 (9th Cir. 1976) it was said

> This cause of action (under 12 U.S.C. § 93) requires the plaintiff to demonstrate that the damages are personal to him.

542 F.2d at 500.

In the Court's view, the gravaman of DATA LEASE's amended counterclaim seeks damages for the diminution in value of DATA LEASE's stock as a result of the directors alleged violation of the banking laws. The Court finds that damage suffered by way of a decrease in the value of the MNB stock, absent a special or contractual relationship, can be redressed only by the corporation or through a derivative action. Accordingly, as there has been no showing of a contractual or special relationship giving DATA LEASE standing to bring a direct claim against the Third Party Defendants, it is

ORDERED AND ADJUDGED that the Third Party Defendants' STEFAN, SKINNER, MELCHING, KURSEN [sic], GRAFTON, MARLIN and MACHATA Motion for Summary Judgment against DATA LEASE as to Counts I and II of DATA LEASE's counterclaim be and the same hereby is GRANTED.

In view of the foregoing, it is ORDERED that DATA LEASE's Cross Motion for Summary Judgment against the Third Party Defendants be and the same hereby is DENIED as moot.

Motion to Dismiss Counts VI, VII, and VIII

After some seven years of pre-trial pleadings, on June 27, 1985 DATA LEASE sought leave to file an amendment to its counterclaim to add three new

counts sounding in Federal RICO[3], Florida RICO[4], and civil theft[5], which the Court permitted to be filed on October 11, 1985.[6] Counts VI and VII are virtually identical; DATA LEASE alleges in both that Third Party Defendant STEFAN has been convicted of mail fraud, wire fraud and unlawful transportation of securities in interstate commerce, all reflecting a pattern of racketeering activity. The Counts allege that through these racketeering activities, CITIBANK and STEFAN acquired and maintained control of MNB, and further "conducted and participated in the conduct of MNB's affairs" thereby causing injury to DATA LEASE.

In Count VIII DATA LEASE alleges that, in October 1977, CITIBANK, STEFAN and Third Party Defendant SKINNER converted the pledged collateral by backdating the reregistration of the subject MNB shares, thereby rendering DATA LEASE unable to deliver a percentage of those shares to a third party purchaser. DATA LEASE contends that the backdating was an "appropriation" of DATA LEASE's property and actionable under the civil theft provisions.[7]

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[3] 18 U.S.C. § 1961 *et seq.*

[4] Fla. Stat. § 895.01 *et seq.*

[5] Fla. Stat. § 812.014(1).

[6] As has been previously stated, this case consisting of some twenty-three file volumes was transferred to this division on August 30, 1985. At the time the Court allowed the amendment to be filed in October 1985, it was not as familiar with the underlying facts as it is now after extensive examination of the record. After research and reflection, the Court should have denied DATA LEASE's Motion for Leave to Amend.

[7] Fla. Stat. § 812.014(1)

On October 23, 1985 CITIBANK filed its Motion to Dismiss the newly filed counts, asserting that all three were time barred, and further asserting that DATA LEASE was impermissably attempting to impose RICO liability upon it under a theory of respondeat superior. On October 23, 1985 Third Party Defendant STEFAN filed an answer, incorporating a motion to dismiss Counts VI, VII AND VIII, and raising the affirmative defenses of statute of limitations, collateral estoppel and res judicata. On the same date Third Party Defendant SKINNER joined in and adopted STEFAN's answer and motion to dismiss.

Under applicable statutory provisions and case decisions the statute of limitations for both Counts VI and VII is five years.[8] All of the predicate acts giving rise to the RICO claims occurred during Third Party Defendant STEFAN's tenure as Chairman of the Board of MNB, a position he held until 1978. The statute of limitations expired at the latest in December 1983. As the amendment was not filed until June 1985, the Court finds that the Count VI and VII RICO claims are time barred. In holding that the Counts were untimely filed, the Court is mindful of the relation-back doctrine of *Fed.R.Civ.P.* 15(c) and the liberal construction which this Rule is afforded. The Court is equally aware, however, that if an amended pleading raises a new and different cause of action, founded upon new facts, the amendment will not relate back. *National Distillers & Chemical Corp. v. Beads Machine Products, Inc.*, 666 F.2d 492 (11th Cir. 1982). In the instant case, even a liberal reading of the Second Amended Counterclaim does not re-

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[8] Fla. Stat. § 895.05(10) and *Bowling v. Founders Title Co.*, 773 F.2d 1175 (11th Cir. 1985)

veal any mention of wire fraud, mail fraud or any other type of criminal activity rising to a level civilly actionable under the pertinent RICO statutes. Consequently, the claims found in Counts VI and VII are new to this cause and do not warrant application of the relation-back doctrine.

The Court further finds that DATA LEASE's claim that CITIBANK, STEFAN and SKINNER backdated the reregistration of the MNB shares, thereby preventing the delivery of the shares to a third party purchaser, has been extensively litigated in the state courts of Florida, and those courts have conclusively determined that issue adversely to DATA LEASE. See *Blackhawk Heating and Plumbing Co., Inc. v. Data Lease Financial Corp.*, 446 So.2d 127 (Fla. 4th DCA 1983); *Citibank N.A. v. Data Lease Financial Corp.*, 10 FLW 2360 (Fla. Dist. Ct. App., Oct. 16, 1985). Accordingly, under the doctrine of collateral estoppel, Count VIII is DISMISSED with prejudice.

The Court further finds that the doctrine of collateral estoppel, which bars duplication of judicial effort, is equally applicable to Count VIII as it pertains to the Third Party Defendants STEFAN AND SKINNER as agents of CITIBANK, even though they were not parties to the state actions. See *Akins v. Hudson Pulp & Paper Co.*, 330 So. 2d 757 (Fla. 1st DCA 1976). Based upon the foregoing, CITIBANK's Motion to Dismiss Counts VI, VII and VIII of the June 27, 1985 Amendment to the Second Amended Counterclaim is hereby GRANTED and Counts VI, VII and VIII of DATA LEASE's Second Amended Counterclaim are hereby DISMISSED with prejudice as to CITIBANK. Furthermore, this Court will consider Third Party Defendants STEFAN and SKIN-

NER's affirmative defenses set forth in their October 23, 1985 responsive pleadings as Motions to Dismiss, and accordingly, Counts VI, VII and VIII, with regards to Third Party Defendants STEFAN and SKINNER are hereby DISMISSED with prejudice. Finally, DATA LEASE's Motion to Strike CITIBANK's November 15, 1985 Reply to DATA LEASE's Memorandum in Opposition is hereby DENIED as moot.

CONCLUSION

In accordance with the foregoing, it is hereby ORDERED that:

1. CITIBANK's November 13, 1984 Motion for Partial Summary Judgment is GRANTED.

2. Third Party Defendants' STEFAN, SKINNER, MELCHING, KURSEN [sic], GRAFTON, MARLIN and MACHATA's March 29, 1985 Motion for Summary Judgment on Counts I and II of DATA LEASE's Second Amended Counterclaim and Third Party Complaint is GRANTED.

3. DATA LEASE's April 11, 1985 Motion for Summary Judgment against the Third Party Defendants is DENIED as moot.

4. CITIBANK'S October 23, 1985 Motion to Dismiss DATA LEASE's Amendment to the Second Amended Counterclaim is GRANTED and Counts VI, VII and VIII of DATA LEASE's Second Amended Counterclaim are hereby DISMISSED with prejudice as to CITIBANK.

5. The Third Party Defendant STEFAN and SKINNER set forth Affirmative Defenses in their answers filed on October 23, 1985 which are consid-

ered and construed by this Court as Motions to Dismiss DATA LEASE's Amendment to the Second Amended Counterclaim and as such are hereby GRANTED. Accordingly, Counts VI, VII and VIII of DATA LEASE' s Amendment to the Second Amended Counterclaim are hereby DISMISSED with prejudice as to STEFAN and SKINNER.

6. DATA LEASE's November 20, 1985 Motion to Strike CITIBANK's Reply to DATA LEASE's Memorandum in Opposition is DENIED as moot.

DONE AND ORDERED at Miami, Dade County, Florida this 8th day of January, 1986.

LENORE C. NESBITT
U.S. DISTRICT JUDGE

cc: Counsel of Record

United States District Court
Southern District of Florida

CASE NO. 78-5747-CIV-NESBITT

CITIBANK,

Plaintiff,

vs.

DATA LEASE,

Defendant.

ORDER

Plaintiff CITIBANK originally moved for a summary judgment in this action on the issue of its vicarious liability which motion was granted by the Court by a previous order.[1] CITIBANK is now before the Court upon motion for summary judgment in its favor on both the complaint against DATA LEASE and on DATA LEASE's second amended counterclaim (counterclaim).

As the Court has recounted the underlying story of this case on two occasions,[2] yet another recitation of the alleged facts, causes of action, affirmative defenses and counterclaims would be an unnecessary task. Nevertheless, in the interest of clarity, the allegations are briefly restated as follows.

CITIBANK brought this action to foreclose on collateral pledged to CITIBANK by DATA LEASE, including stock of the Miami National Bank (MNB)

[1] Omnibus Order of January 9, 1986.

[2] Omnibus Order *supra* and Order of February 26, 1986.

and the First American Bank of North Palm Beach. The principal amounts of the loans and the interest rates are not in dispute. DATA LEASE alleged twelve affirmative defenses, all of which are premised upon: (1) the enforceability of a 1975 agreement between CITIBANK and DATA LEASE, regarding the alleged turnover of MNB to CITIBANK (turnover agreement); and (2) CITIBANK's purported control over MNB through its "agents," the Third Party Defendant directors and officers of MNB. DATA LEASE also filed a five-count counterclaim against CITIBANK sounding in conversion, fraud, common law breach of bailment and violations of the Florida Uniform Commercial Code.

In its Order,[3] the Court held that the "turnover agreement" was void and unenforceable as any "control" by CITIBANK was contrary to established applicable law and banking regulations. The Court also determined that the Third Party Defendant directors were not the agents of CITIBANK and that CITIBANK could not, therefore, be held responsible for the acts of the Third Party Defendants.

The Court is mindful that in passing upon a motion for summary judgment, the Court cannot try issues of fact; it can only determine whether there are issues to be tried, and it "must view the evidence in a light most favorable to the party resisting the motion." *Everhart v. Drake Management, Inc.*, 627 F.2d 686, 690 (5th Cir. 1980). A party seeking summary judgment bears the burden of demonstrating that no genuine dispute exists as to any material fact in the case. *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838 (11th Cir. 1985).

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[3] Omnibus Order of January 9, 1986.

Equally well established is the rule that in order to avoid the granting of a summary judgment, "a party must demonstrate both the existence of a material fact and a genuine issue as to that material fact. A fact is material if it constitutes a legal defense to an action." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980).

When a movant makes out a convincing showing that genuine issues of fact are lacking, in order to deny a motion for summary judgment, it is required "that the adversary adequately demonstrate by receivable facts that a real, not a formal controversy exists." *Mandalay Shores Co-op Housing Assn. v. Pierce*, 667 F.2d 1195, 1197 (5th Cir. 1982). The Court is further aware that summary procedures should be used sparingly in litigation which by reason of multiplicity of issue and extensive discovery has become complex and where there are allegations of wrongful motive or fraud. *See Amey, Inc. v. Gulf Abstract & Title Inc.*, 758 F.2d 1486 (11th Cir. 1985).

On this record and after due consideration of the oral arguments of counsel and their memoranda and supplemented memoranda requested, the Court fails to see any material issues of fact which constitute a legal defense or a valid claim to avoid or diminish CITIBANK's complaint on the indebtedness. It would be an easy course to follow if the Court simply believed that because of the years of litigation and discovery, the case has become so involved that it is not susceptible to disposition by summary judgment. Perhaps years ago, in the beginning, this case would not have been particularly complex, but even if it has become so, "(t)he existence of a difficult or complicated question of law, when there is no issue

as to the facts is not a bar to summary judgment." *Erco Industries Ltd. v. Seaboard Coast Line Railroad Co.*, 644 F.2d 424, 431 (5th Cir. 1981). The Court cannot permit this case to go to trial with only a wing and a prayer that issues of fact may emerge. Inasmuch as the parties do not dispute the events which essentially occurred, but merely dispute the significance of the events, the Court finds summary judgment appropriate.

For the purposes of analysis, the Court will consider first the counterclaim and thereafter the affirmative defenses as both are premised on the same facts and purportedly wrongful actions.

The Counterclaim

Conversion

In Count I of its Amended Counterclaim DATA LEASE alleges three theories to support its claim that CITIBANK converted the MNB stock pledged as collateral. First, DATA LEASE avers that CITIBANK converted the pledged shares by denying DATA LEASE the right to vote the MNB stock. There is no issue as to the fact that it was former Third Party Defendants Stefan and Skinner who denied DATA LEASE the purported "right to vote" the shares. The Court has also previously ruled, as a matter of law, that the Third Party Defendants were not the agents of CITIBANK and that CITIBANK could not be held liable for their acts in the management and operation of MNB.

As a second basis for its conversion claim, DATA LEASE contends that CITIBANK through its directors, the Third Party Defendants, denied it access to information concerning the management, op-

erations and conditions at MNB. There is no dispute that this agreement was subject to the approval of the Comptroller of the currency who disapproved of the agreement, nor any dispute that it was the directors of MNB, if anyone at all, who denied DATA LEASE's representative "access" to the bank. Even assuming this was improper, there was no breach of any actionable duty by CITIBANK with respect to the alleged denial of access to MNB.

As a third and final basis for its claim of conversion, DATA LEASE alleges that CITIBANK misused the pledged collateral. As the Court has previously held, CITIBANK could not be liable for any acts of the Third Party Defendants as directors of MNB, even if their actions caused "deterioration" in the value of the MNB stock. Further, for the reasons hereinafter stated regarding the duties of CITIBANK as the pledgee of the MNB stock, there can be no genuine issue of fact as to whether CITIBANK "misused or abused" the pledged property.

Fraud

The Court has previously recited, by Order of February 26, 1986, the elements of fraud under Florida law as summarized in *Royal Typewriter Company v. Xerox Supplies*, 719 F.2d 1092 (11th Cir. 1983). In that order the Court set forth the elements which it found missing in DATA LEASE's cause of action for fraud and invited the parties to point to any record evidence that would support the elements of inducement and consequent injury. In considering the parties' responses in a "light most favorable" to DATA LEASE, the Court finds that DATA LEASE has failed to demonstrate any record evidence to legally support either of the "missing"

elements. It is fundamental that even assuming a fraudulent misrepresentation, there must be reliance and action thereon amounting to a substantial change of position. *Biscayne Boulevard Properties, Inc. v. Graham*, 65 So.2d 858 (Fla. 1953).

By its allegations DATA LEASE contends that it was induced by CITIBANK's misrepresentations to surrender control of the MNB to CITIBANK as a result of the 1975 turnover agreement. It is, however, an uncontroverted fact that as of July 12, 1974, and during all pertinent times thereafter, DATA LEASE was in default under the loan and pledge agreement. It is further undisputed that, under the loan and pledge agreement, once DATA LEASE defaulted, CITIBANK obtained the sole and exclusive right to vote the 870,000 pledged MNB shares.

Even assuming that the 1975 turnover agreement induced DATA LEASE to give CITIBANK "control" over the operations and affairs of MNB, as previously held by the Court, this turnover of control was unlawful and the agreement thereby unenforceable. If on the other hand DATA LEASE contends that it was fraudulently induced into giving up its right to determine the membership of the board of directors of MNB, this position is unavailing as DATA LEASE's voting rights terminated when it was in default. Therefore after July 12, 1974, CITIBANK had the exclusive right to vote the MNB shares.

In any event, DATA LEASE could not have entered into any agreement involving the shares. In late 1974 the Florida Supreme Court reinstated an injunction restraining DATA LEASE from conveying any of the MNB shares. *Blackhawk Heating &*

Plumbing Co. v. Data Lease Financial Corp., 302 So.2d 404 (Fla. 1974).[4] DATA LEASE therefore "gave up" nothing in May 1975. DATA LEASE was in essentially the same position, in default, under the loan and pledge agreement after the turnover agreement as it was prior to the agreement. Thus, there can be no showing that DATA LEASE took any action or suffered any detriment that it was not already obligated to take under the 1973 loan and pledge agreement. *Sherban v. Richardson*, 445 So.2d 1147, (Fla. 4th DCA 1984). Further, there can be no recovery for fraud for inducing one to do what they are already obligated to do. *Betterton v. First Interstate Bank of Arizona, N.A.*, 615 F.Supp. 72 (E.D. Mo. 1985). As was recently stated in *Atlantic National Bank of Florida v. Vest*, 480 So.2d 1328, 1332 (Fla. 2nd DCA 1985):

> . . . the determination of inducement turns on whether a sufficient casual relationship is established between the misstatement and the representee's subsequent act.

DATA LEASE, in its reply to the Court's recent inquiry regarding the elements of fraud, now asserts that it was induced to "voluntarily cooperate" with CITIBANK in changing the management of MNB through the turnover agreement, and that this change in management benefited CITIBANK.[5] There are two fatal legal weaknesses in DATA LEASE's

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[4] Pre-trial stipulation filed January 31, 1986, *Stipulated Facts*, paragraph 14, Page 9. (For a chronological history of the *Blackhawk* litigation, *See Blackhawk Heating & Plumbing v. Data Lease Financial Corporation*, 446 So.2d 127 (Fla. 1983).

[5] Data Lease, in its Memorandum in Response to Order Dated February 26, 1986, states as follows:

argument: first, even assuming "voluntary cooperation" by DATA LEASE, the turning over of control of the MNB's board of directors was a void and unenforceable transaction. Secondly, an essential element of fraud requires that the complainant suffer damage resulting from action taken in justifiable reliance on the misrepresentation. It is immaterial that CITIBANK may have obtained some benefit as a result of the 1975 turnover agreement. DATA LEASE was in default at the time of the turnover agreement and had "given up" the voting rights some two years previously. Consequently, DATA LEASE suffered no damages proximately caused by any representations made by CITIBANK at the time of the turnover agreement.

UCC Claims

In Count III of its Amended Counterclaim DATA LEASE alleges that CITIBANK negligently breached its common law bailment duties under the pledge agreement. Specifically, DATA LEASE contends that CITIBANK failed to use reasonable diligence and care in safeguarding the MNB stock pledged as collateral. In Count IV DATA LEASE restates its allegation tht [sic] CITIBANK was negligent in the preservation of the pledged stock, and further alleges that ~~by this~~ negligence CITIBANK violated the

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Had Data Lease refused, in 1975, to allow the change in management of the Miami National Bank sought by Citibank, Citibank could not have voted the stock of the Miami National Bank without beginning the two year limitation on control of an out-of-state bank provided by the Bank Holding Company Act of 1956. Citibank could not have foreclosed on and sold the Miami National Bank stock because of the Blackhawk litigation. (p.7).

duties imposed upon a pledgee under § 679.207(1) of the Florida Uniform Commercial Code (UCC).

Case law holds that where the UCC provides a specific remedy for an actionable wrong, its provisions are exclusive. *Kelly v. Miller*, 575 P.2d 1221 (Alaska 1978). § 679.207 of the Florida UCC establishes the standard of care required of a pledgee in possession of collateral and provides a remedy for a breach of that duty. Thus DATA LEASE's common law claim of negligent bailment as alleged in Count III is superseded by the more specific remedy provided in § 679.207 and alleged in Count IV.

Counts IV and V of DATA LEASE's counterclaim seek relief under the UCC for the diminished value of the MNB stock pledged as collateral. It is well settled that a pledgee of securities only has a duty to physically preserve those securities; he need not preserve their underlying value.[6] *Tepper v. Chase Manhattan Bank, N.A.*, 376 So.2d 35 (Fla. 3d DCA 1979). There is no genuine issue as to the fact that CITIBANK physically preserved the pledged shares, thereby discharging, as a matter of law, its pledgee duties under the UCC.

Further, in Count V DATA LEASE alleges that after its 1974 default under the loan and pledge agreement, CITIBANK failed to act in a commercially reasonable manner and thereby breached its duty of good faith as required by § 679.501 et. seq.

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[6] While liability may be imposed upon a pledgee for acting with *specific intent* to depreciate the value of the pledged stock, *Federal Deposit Insurance Corp. v. Webb*, 464 F.Supp. 520, 526 (E.D. Tenn. 1978); *Empire Life Ins. Co. v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972), Data Lease has stated its claims under a theory of negligence.

and § 671.203, Fla.Stat., respectively. It is undisputed that CITIBANK physically preserved the pledged MNB shares until they were sold pursuant to an emergency judicial sale confirmed and approved by Judge Hoeveler on February 7, 1979.[7] Fla. Stat. § 679.507(2) provides the following:

> . . . a disposition (of collateral) which has been approved in any judicial proceeding . . . shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any disposition not so approved is not commercially reasonable.

As the sale of the MNB stock was approved in a judicial proceeding, it is presumed that the stock was disposed of in a commercially reasonable manner.

There is no question that CITIBANK physically preserved the MNB shares until they were turned over to the Court for judicial disposition. Even assuming DATA LEASE's theory that CITIBANK should have disposed of the shares in a commercially reasonable manner at or prior to the 1975 agreement rather than entering into the agreement, CITIBANK possessed no alternative. As a result of the *Blackhawk*[8] injunction, precipitated by DATA LEASE's actions, there was an impediment to any realistic "commercially reasonable" disposition of the collateral.

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[7] *Citibank, N.A. v. Data Lease Financial Corp.*, 645 F.2d 333 (5th Cir. 1981).

[8] See footnote 4, *supra* p. 7.

The Affirmative Defenses

To prevail on a summary judgment motion, a plaintiff must not only establish that there are no genuine issues of material fact as to its claim, but must also establish that there are no genuine issues of material fact as to any of the affirmative defenses raised in opposition to that claim. *Reid v. Graybeal,* 73 F.R.D. 626 (W.D. Okla. 1977).

As has been previously stated, the numerous affirmative defenses are based on three legal premises: (1) the viability of the 1975 turnover agreement, (2) the control by CITIBANK over MNB through the Third Party Defendant directors, or (3) a combination of (1) and (2).

DATA LEASE's affirmative defenses as to Counts III (discharge), IV (fraud), V (breach of contract), VI (discharge), VII (frustration of purpose, X (unclean hands), and XI (laches) are all premised upon the effect of the 1975 turnover agreement, the alleged wrongful inducement to enter into the agreement, or breaches of the agreement. As all of the above enumerated affirmative defenses are based in whole or in part on the turnover agreement, determined by the Court to be void and unenforceable, they fail as a matter of law.

The affirmative defenses set forth in Count I (discharge), Count II (satisfaction and discharge), Count VIII (waiver) and Count IX (estoppel), are all based on CITIBANK's alleged control over MNB through CITIBANK's agents. As the Court has previously ruled that the Third Party Defendants were not the agents of CITIBANK while acting in their capacity as directors of MNB, and that CITIBANK cannot be held vicariously liable for their purported

wrongful actions, as a matter of law, these defenses fail as well.

DATA LEASE's twelfth affirmative defense, Set-off, depends upon the claims raised in the amended counterclaim. As the Court has ruled that these claims are legally invalid, DATA LEASE cannot raise those claims as a defense to CITIBANK's action.

Conclusion

Based upon the foregoing, the Motion for Summary Judgment filed by CITIBANK in its favor on its complaint against DATA LEASE is GRANTED. The Motion for Summary Judgment filed by CITIBANK in its favor on DATA LEASE's counterclaim is GRANTED. CITIBANK is directed to submit an appropriate proposed final judgment within five (5) days from date of entry of this Order.

DONE AND ORDERED at Miami, Dade County, Florida this 21st day of March, 1986.

LENORE C. NESBITT
U.S. DISTRICT JUDGE

cc: Counsel of Record

United States District Court
Southern District of Florida

CASE NO. 78-5747-CIV-NESBITT

CITIBANK, N.A.,

Plaintiff,

v.

DATA LEASE FINANCIAL CORPORATION, et al.,

Defendants.

FINAL JUDGMENT OF FORECLOSURE

This action came on before the Court on motions for summary judgment and a decision having been duly rendered, it is ORDERED and ADJUDGED:

1. There is due to plaintiff Citibank, N.A. ("Citibank") from defendant Data Lease Financial Corporation ("Data Lease") on the loans sued on in this action the principal sum of $7,182,373.65, and interest thereon in the amount of $11,182,241.83, for a total amount due of $18,364,615.48.

2. Citibank holds a valid and enforceable security interest in collateral, described and defined in Citibank's complaint and the Pledge Agreement effective as of April 12, 1973 attached thereto, which secures the indebtedness set forth in paragraph 1. Citibank's security interest in the collateral is superior to any right, title, interest, or claim of any other party or any person claiming through any such party.

3. Citibank is entitled to have Data Lease's equity of redemption in the collateral foreclosed. Unless Data Lease pays the total amount due Citibank, as set forth in paragraph 1, to the Clerk of the United States District Court for the Southern District of Florida within five (5) days from the date of this Final Judgment of Foreclosure, Data Lease's equity of redemption will be foreclosed and the collateral will be ordered assembled and sold by the United States Marshal for Southern District of Florida at judicial sale, pursuant to 28 U.S.C. § 2001, as provided for under 28 U.S.C. § 2004, free of any right, title, interest or claim of any other party or any person claiming through any such party.

4. The counterclaim and third party action of Data Lease against Citibank and the third party defendants Joseph Stefan, Truman A. Skinner, R. Dale Melching, William A. Krusen, Robert M. Marlin, Andrew Machata and Edward G. Grafton be and the same are hereby dismissed. The crossclaim of Citibank, having been rendered moot, also is hereby dismissed.

5. This Court further finds that there is no just reason for delay and expressly directs that this Final Judgment of Foreclosure be entered at this time in favor of Citibank and against Data Lease on the complaint and the counterclaim and in favor of the third party defendants and against Data Lease on the third party complaint. The stay of proceedings arising from Citibank's second amendment to complaint against First American Bank of Palm Beach County, now First American Bank and Trust, pursuant to the orders of stay dated January 17, 1983 and March 24, 1983 is hereby terminated. Citibank and First American Bank of Palm Beach County shall file

a joint status report as to any issues to be resolved between the parties as a result of this Final Judgment of Foreclosure. The status report shall be filed by April 25, 1986.

6. This Court reserves jurisdiction over any judicial sale as well as the determination of attorneys' fees, costs, credits, the amount of any deficiency and such further matters as may be necessary to effectuate this Final Judgment of Foreclosure.

DONE AND ORDERED at Miami, Dade County, Florida this 7th day of April, 1986.

LENORE C. NESBITT
U.S. DISTRICT JUDGE

cc: Counsel of Record

NO. 86-5324

in the

United States Court of Appeals for the Eleventh Circuit

CITIBANK, N.A.,

Plaintiff-Counterclaim
Defendant, Third-Party
Defendant-Appellee,

versus

DATA LEASE FINANCIAL CORP.,

Defendant-Counterclaim
Plaintiff, Third-Party
Plaintiff-Appellant,

versus

JOSEPH STEFAN, ET. AL.,

Third-Party
Defendants-Appellees.

Appeal from the United States District Court
for the
Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING IN BANC

(Opinion September 28, 1987, 11 Cir., 198_, __F.2d__).
(November 3, 1987)

Before RONEY, Chief Judge, VANCE, Circuit Judge, and PITTMAN*, Senior District Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular

active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

* Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 86-5324

CITIBANK, N.A.,

Plaintiff-Appellee,

vs.

DATA LEASE FINANCIAL CORPORATION,

Defendant-Appellant.

PETITION FOR REHEARING AND SUGGESTION OF REHEARING IN BANC OF APPELLEE CITIBANK, N.A.

On Appeal From
The United States District Court

For The Southern District Of Florida

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CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

PARTIES

CITIBANK, N.A.
DATA LEASE FINANCIAL CORPORATION
EDWARD C. GRAFTON
WILLIAM A. KRUSEN
ANDREW MACHATA
ROBERT M. MARLIN
R. DALE MELCHING
TRUMAN A SKINNER
JOSEPH STEFAN

OTHER INTERESTED PARTIES

BLACKHAWK HEATING & PLUMBING COMPANY, INC.
MGIC INDEMNITY CORPORATION
MIAMI NATIONAL BANK

JUDGES

WILLIAM M. HOEVELER
ALCEE L. HASTINGS
JAMES L. KING
STANLEY C. MARCUS
THOMAS E. SCOTT
LENORE C. NESBITT
PAUL H. RONEY
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_____
JOHN H. SCHULTE

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this circuit, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Empire Life Insurance Co. of America v. Valdak Corp.,
468 F.2d 330 (5th Cir. 1972)

Anderson v. Liberty Lobby, Inc.,
106 S.Ct. 2505 (1986)

Celotex Corp. v. Catrett,
106 S.Ct. 2548 (1986)

Matsushita Electric Industrial Co. v. Zenith Radio Corp.,
106 S.Ct. 1348 (1986)

Barnes v. Southwest Forest Industries, Inc.,
814 F.2d 607 (11th Cir. 1987)

JOHN H. SCHULTE

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12 U.S.C. § 71 9

STATEMENT OF THE ISSUES WHICH MERIT IN BANC CONSIDERATION

I. Whether the panel opinion departed from the controlling law in this circuit regarding the duty of a pledgee of stock to the pledgor, so as to eliminate the specific intent requirement set forth in *Empire Life Insurance Co. of America v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972), and thus created a direct conflict within this circuit.

II. Whether the panel opinion departed from, and is in direct conflict with, recent precedent of the Supreme Court and this circuit regarding the standards to be applied under Rule 56 of the Federal Rules of Civil Procedure.

STATEMENT OF COURSE OF PROCEEDINGS

Plaintiff Citibank, N.A. ("Citibank") brought this action against defendant Data Lease Financial Corporation ("Data Lease") in December 1978. Citibank sought, among other things, to foreclose on shares of the capital stock of Miami National Bank ("Miami National") which had been pledged to Citibank as collateral for loans to Data Lease. On January 29, 1979, following an evidentiary hearing, the district court ordered the interlocutory judicial sale of the Miami National stock. The stock was sold at judicial sale on February 27, 1979, which was confirmed by the district court, and affirmed by the Fifth Circuit. *Citibank, N.A. v. Data Lease Fin. Corp.*, 645 F.2d 333 (5th Cir. 1981).

Data Lease filed its second amended answer, counterclaim, and third party complaint in 1980. In June 1985, Data Lease

served an amendment to its counterclaim and third party complaint. In early 1986, the district court entered several orders granting summary judgment in favor of Citibank and the third party defendants. On April 8, 1986, the district court entered its final judgment of foreclosure from which Data Lease appealed. On September 8, 1987, the panel issued its decision and opinion reversing the district court and remanding the case.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUES

In 1973, Citibank loaned Data Lease over $6.2 million. As security for the loan, Data Lease pledged to Citibank 870,000 shares (80.2%) of Miami National stock pursuant to a pledge agreement executed by Data Lease and Citibank. On July 12, 1974, Data Lease defaulted on its obligations to Citibank and remained in default at all times thereafter.

In early 1975, national bank examiners called into question Miami National's financial soundness and the competence of its management. The Regional Administrator of National Banks informed Miami National's board of directors that he was "shocked and alarmed" at the financial condition of the bank and that "the future well-being of [Miami National] appear[ed] questionable." The Miami National board of directors decided that the chairman of the board, Roy Talmo, who was also Data Lease's chairman, could no longer participate in the bank's management.

On May 16, 1975, five Miami National directors, including Talmo, resigned from the board pursuant to an agreement (the

"turnover agreement") embodied in a memorandum of understanding signed by Citibank and Data Lease. Eight other directors, all elected by Data Lease prior to May 1975, remained on the board. The remaining board members selected third party defendants Joseph Stefan and Truman Skinner to fill vacancies created by the resignations, and elected Stefan as president and chairman of the board.

Beginning in 1976, Citibank exercised its right under the pledge agreement to vote the Miami National stock it held as collateral. Only two of the third party defendant directors were Citibank nominees; the remaining five were Data Lease's designees. There was no relationship whatsoever between Citibank and the majority of the board of directors of Miami National, other than the fact that Citibank voted for them after their first having been installed on the Miami National board by Data Lease.

Data Lease claims that from May 1975 to November 1978 the board of directors of Miami National mismanaged the bank. The counterclaim seeks to hold Citibank liable for any decline in the underlying value of the pledged stock caused by mismanagement of Miami National by the third party defendant directors.[1]

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[1] These foregoing facts are taken from the Statement of Facts set out in the panel opinion at 4810-11. They were referenced to the record in Citibank's brief. The panel, in

the body of its opinion, departed from these facts and instead merely utilized the unsupported contentions of Data Lease. Thus, there is substantial confusion between what the panel says are the facts in the "Statement of Facts" and what it utilizes as "facts" in the body of the opinion.

Data Lease does not and cannot claim that Citibank or the directors of Miami National acted with a specific intent to depreciate the underlying value of the Miami National stock. Furthermore, Data Lease admits that it "does not allege that Citibank ran the Miami National Bank from New York ...." (R. 24 989 6). Instead, as Data Lease conceded in February 1986, its real claim is "that Citibank took control of the Miami National Bank *by installing its directors and officers* in May, 1975, and by re-electing those people in 1976, 1977, and 1978." *Id.* Based on such alleged "control," Data Lease contends that all of the directors of Miami National were "agents" or "designees" of Citibank, and that Citibank can be held vicariously liable for any mismanagement of Miami National by the board of directors.

Citibank brought to this Court's attention, in a motion to strike, that Data Lease relied in its brief upon various "Def. ex.", without record reference. It is doubtful that the panel was able to locate and review these "Def. ex." If it had, it would have found that the exhibits failed to support Data Lease's factual contentions. For example, the panel's statement that Citibank urged "that significant sums of money be loaned [by Miami National] to questionable people for dubious projects" (Opinion at 4821), is totally unsupported by the record and was not even alleged. See Counts VI and VII of Data Lease's amendment to its counterclaim (R. 21 852 1-5). It is simply unfair and unjust for the panel to set out as "fact" that which does not exist of record.

ARGUMENT AND AUTHORITIES

THE PANEL OPINION CREATES A DIRECT CONFLICT WITHIN THIS CIRCUIT

The panel holds that Citibank, as pledgee of the Miami National stock, could be held liable for a decline in the underlying value of the stock resulting from mismanagement by directors elected and re-elected by Citibank, even though there was no evidence or allegation that Citibank acted with a specific intent to depreciate the value of the stock collateral. The panel's opinion directly conflicts with *Empire Life Insurance Co. of America v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972), the very case the panel sought to rely upon. *Empire* holds that the pledgee of stock, in control of the company represented by the stock, cannot be held liable for a decline in value of the stock held as collateral in the absence of a specific intent to depreciate the value of the stock with the dishonest purpose of acquiring the stock at forced sale. 468 F.2d at 335-36.

The *Empire* panel, like the panel here, quotes and adopts the law as set out in *Ritchie v. McMullen*, 79 F. 522 (6th Cir.), *cert. denied*, 168 U.S. 710 (1897). *Compare Empire* at 335-36 *and* Opinion at 4816. But, unlike *Empire*, the panel's opinion omits and departs from the key language of *Ritchie* regarding the duty of care of a pledgee of stock in regard to the underlying value of the stock:

[T]he fact that the pledgee of stock controls the company represented by the stock does not eliminate its duty not to deplete the collateral intentionally. The general rule [is that]:

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> The bailee owes a direct duty to the pledgor to be reasonably careful that no harm shall come through his custody to the subject-matter of the pledge . . . *It is true that the obligations of the pledgee of stock to the pledgor would not be violated by the pledgee if the stock held in pledge suffered a loss in value through negligence of the pledgee in acting as director of the company or through ill-advised or negligent voting of other stock owned by him.* . . . But, if such pledgee use his position as director and his vote as stockholder *intentionally to depreciate the stock of his pledgor held in pledge with the dishonest purpose of acquiring ownership of the stock at forced sale,* this is a direct injury done by him to his pledgor. . . .

Empire, 468 F.2d at 335-36 (quoting *Ritchie*, 79 F. at 533-34) (emphasis added).

Empire and *Ritchie* demonstrate that neither mismanagement nor negligent voting by the pledgee in control of the corporation represented by the pledged stock gives rise to an action by the pledgor against the pledgee. Rather, *specific intent* to deplete the underlying value of the collateral, with a dishonest purpose of acquiring ownership, is essential to any such cause of action. *See FDIC v. Webb*, 464 F. Supp. 520, 526 (E.D. Tenn. 1978) (holding

that a pledgor, seeking to recover under U.C.C. §9-207 for a decline in value of stock collateral, must show that the pledgee acted with the specific intent to depreciate the underlying value of the pledged stock).[2]

Under *Empire*, Data Lease would have no claim against Citibank even were a jury to find that Citibank "install[ed] and maintain[ed] incompetent individuals in positions of management at Miami National" or "blithely allowed these individuals to deplete the value of the pledged collateral" (Opinion at 4820-21). Specific intent is an essential element in these circumstances. The panel's departure from *Empire* must be reconsidered by this Court *in banc*.

If permitted to become the law of this circuit, the panel opinion will discourage, if not eliminate, cooperation between secured lenders and troubled debtors. There has long been "a legitimate and customary practice of keeping an oversight by a creditor over the business, management, and operations of a debtor of doubtful solvency." *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483

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[2] The panel opinion did not cite *Webb* but did refer to *Cowin v. Bresler*, 741 F.2d 410 (D.C. Cir. 1984). In *Cowin*,

Judge Bork recognized that *Empire* imposed a duty upon a pledgee "not to deplete the value of the collateral intentionally." *Id.* at 415. The district court's order on Data Lease's U.C.C. and bailment counts correctly applied *Empire*, and specifically noted that Data Lease does not claim that Citibank acted with the necessary specific intent to deplete the value of the Miami National stock (R. 25 1001 10).

F.2d 1098, 1105 (5th Cir. 1973) (quoting *Chicago Mill & Lumber Co. v. Boatmen's Bank*, 234 F. 41, 46 (8th Cir. 1916)); *see also Ritchie*, 79 F. at 551. If direct liability is imposed upon a pledgee for mismanagement by a board of directors or for negligent voting, absent a showing of specific intent by the pledgee to depreciate the underlying value of the pledged stock, no

secured lender will be inclined to assist a troubled debtor in a workout situation. Rather than risk exposure to such liability, in a business climate where difficult business decisions necessarily will be made, a lender will have little choice but to slam the door on the struggling borrower. The panel opinion should not be permitted to become the law of this circuit.

THE PANEL OPINION CONFLICTS WITH CONTROLLING PRECEDENT REGARDING SUMMARY JUDGMENT AND MISAPPREHENDS ESSENTIAL FACTS AND LAW

The panel held that Citibank could be vicariously liable for mismanagement of Miami National by directors elected by Citibank, despite the absence of any contention or probative evidence that Citibank usurped the functions of Miami National's board of directors or controlled and dominated the day-to-day affairs of the bank. Although the panel correctly stated that "the key issue is control and domination" (Opinion at 4814), it failed to consider the degree of control and domination necessary to subject a shareholder to liability for the acts of the

corporation.[3]

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In *Krivo*, Judge Roney outlined the extreme degree of domination in which a controlling shareholder must engage before being subjected to liability:

> [C]ourts require a strong showing that the creditor assumed actual, participatory, total control of the debtor. Merely taking an active part in the management of the debtor corporation does not automatically constitute control, as used in the "instrumentality" doctrine, by the creditor corporation.

483 F.2d at 1105.[4]

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[3] *See, e.g., NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 405 (1960); *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173, 179-81 (5th Cir. 1981), *cert. denied.*, 456 U.S. 983 (1982); *Bendix Home Sys., Inc. v. Hurston Enters., Inc.*, 566 F.2d 1039 (5th Cir. 1978); *Berger v. Columbia Broadcasting Sys., Inc.* 453 F.2d 991, 994-97 (5th Cir.), *cert. denied.*, 409 U.S. 848 (1972); *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1102-06 (5th Cir. 1973); *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929) (Hand, J.); *Aztec Motel, Inc. v. State ex rel. Faircloth*, 251 So.2d 849, 852 (Fla. 1971); *Church of Scientology v. Blackman*, 446 So.2d 190, 192-93 (Dist. Ct. App.), *rev. denied*, 456 So.2d 1181 (Fla. 1984); *Dania Jai-Alai Palace, Inc. v. Sykes*, 425 So.2d 594, 598-599 (Dist. Ct. App. 1982) *aff'd in part, quashed in part on other grounds*, 450 So.2d 1114 (Fla. 1984) (adopting *Krivo*); *Unijax, Inc. v. Factory Ins. Ass'n*, 328 So.2d 448, 453-54 (Dist. Ct. App.), *cert. denied*, 341 So.2d 1086 (Fla. 1976); *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 155 N.E. 58 (1926) (Cardozo, J.).

[4] Courts use the agency, instrumentality, and alter ego metaphors interchangeably. *Weisser v. Mursam Shoe Corp.*, 127 F.2d 344, 348 (2d Cir. 1942); *Vantage View, Inc. v. Bali East Dev. Co.*, 421 So.2d 728, 733 (Fla. Dist. Ct. App. 1982).

The record conclusively demonstrates that Citibank did not control the day-to-day affairs of Miami National. The third party defendant directors testified that they exercised independent judgment in acting as Miami National directors without interference from Citibank.[5] (R. 14 585 42-45,

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51, 53-61, 63). Both Data Lease and its chairman, Roy Talmo, admitted that Citibank did not run the day-to-day operations of Miami National (R. 24 989 6; R. 14 585 2). Data Lease's claim is ultimately based on the contention that Citibank took "control" of Miami National by installing certain directors in May 1975 and by "re-electing those people" in 1976 and 1977 (R. 24 989 6).

The panel incorrectly equates Citibank's ability as a controlling shareholder to install directors on the Miami National board and to set general policy, with the necessary "control and domination". The panel based its holding on passages from the deposition of *one* director, Joseph Stefan, who stated that he "worked" for Citibank, because Citibank, in voting the Miami National stock, "put me there and they took me out," and that "he worked in close coordination with Citibank on 'major matters.'" (Opinion at 4814).

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[5] Only two of the seven director defendants were Citibank designees; the other five director defendants were initially selected and elected by Data Lease. The district court determined that Data Lease's agency theory predicated upon voting control was insufficient as a matter of law to make the directors agents of Citibank "while acting in their capacity as directors" of Miami National. Indeed, the National Bank Act, 12 U.S.C. § 24, 71, mandates that a national bank shall be managed by its board of directors and not some third party.

Stefan's testimony merely manifests the realities of corporate structure.

> Ownership of a controlling interest in a corporation entitles the controlling stockholder to exercise the normal incidents to stock ownership, such as the right to choose directors and set general policies, without forfeiting the protection of limited liability.

Baker v. Raymond Int'l, Inc., 656 F.2d 173, 180 (5th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982) (citing *Berger v. Columbia Broadcasting Sys., Inc.*, 453 F.2d 991, 994 (5th Cir.), *cert. denied.*, 409 U.S. 848 (1972)); *see also Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 980 (4th Cir. 1987) ("If

stockholders were liable whenever they exercised their rightful control, limited liability would be a meaningless fiction because few individuals establish a corporation and then ignore it"). The same standard applies in cases involving creditors and debtors, as this Court explained in *Krivo:*

> The fact that a creditor corporation takes an active part in the management of a debtor corporation does not indicate the necessary control. Rather, the control must be actual, participatory, and total.

483 F.2d at 1105.

The panel's opinion overlooks and departs from recent decisions of the Supreme Court and this Court concerning Rule 56 motions for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*

Corp., 106 S.Ct. 1348 (1986); *Barnes v. Southwest Forest Indus., Inc.*, 814 F.2d 607 (11th Cir. 1987).

In *Celotex*, the Supreme Court ruled that:

> Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

106 S.Ct. at 2552-53. The evidence offered to support the elements of a party's claim must be "significantly probative". *Anderson*, 106 S.Ct. at 2511.

Stefan's testimony was *not* significantly probative so as to raise a *genuine* issue of material fact regarding agency. The Supreme Court has made clear that the jurisprudential cliche

that some issue "is ordinarily a jury question" will no longer suffice. The panel opinion reverts to that anachronistic analysis and fails to apply the tests required by the Supreme Court and this circuit. Absent intervention by this Court *in banc*, the panel opinion will serve as authority to defeat the grant of a summary judgment upon a showing of the *faintest* evidence opposing the motion.

The panel also criticizes the district court judge because she could find no injury suffered by Data Lease in reliance on Citibank's alleged misrepresentations. The district judge followed the dictates of the 1986 Supreme Court Rule 56 cases in requiring Data Lease to make a showing of detrimental reliance, an essential element of its fraud claim (R. 25 1001 6). Data Lease could make no such showing but

could only argue a "benefit" to Citibank because of "cooperation" by Data Lease.

The district court held that Data Lease gave up nothing — it had already given up voting control by its default. The panel simply substitutes "benefit to Citibank" for detrimental reliance and holds that, under the "turnover agreement" Data Lease would "retain ownership and obstensible control over Miami National while Citibank called the shots" (Opinion at 4819). In point of fact, the very first paragraph of the "turnover agreement" provides that the Miami National stock was to be registered in the name of Citibank, thus shifting ostensible ownership and control to Citibank — not Data Lease (R. 14 582 Exh. A). Therefore, there is *no* injury to Data

Lease and the panel's opinion directly contradicts the facts set out by the panel in its statement of facts. *See* footnote 1, *supra.*

The panel's holding concerning the affirmative defenses is also confusing and self-contradicting. The panel holds that the district judge was correct in her reasoning that the turnover agreement would be illegal if it allowed Citibank to manage the affairs of Miami National (as characterized by Data Lease) (Opinion at 4822). The panel then holds, however, that:

> Because of the uncertainties of fact and *law* attending this issue, we think it inappropriate to determine the legality of the turnover agreement on a motion for summary judgment.

(Opinion at 4823) (emphasis added).

That holding is confusing "in fact" because the "turnover agreement" is specifically identified in the panel's statement of facts as being "embodied in a memorandum of understanding signed by Citibank" (Opinion at 4811), and is referred to throughout the opinion. Then, when the panel discusses the affirmative defenses, it inexplicably declares for the first time: "The turnover agreement is evidenced *in part* by a memorandum of understanding executed by Data Lease and Citibank on April 22, 1975" (Opinion at 4822) (emphasis added).

The confusion left by the panel's opinion is heightened by the holding that "uncertainties of law" preclude summary judgment, suggesting that the settlement of issues of law is within the province of the jury. Where else does one test the legality of a contract but on a motion for summary judgment?

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The turnover agreement, embodied in the memorandum of understanding, was before the district court. The only "uncertainty" was Data Lease's characterization of the agreement in its counterclaim (Opinion at 4814 n.6), which would render the agreement illegal, void, and unenforceable.[6] The panel's holding is self-contradictory with regard to

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[6] The agreement was also unlawful because, as Data Lease's counsel warned in its letter of May 8, 1975, it was illegal for Data Lease to have entered into the memorandum of understanding in violation of the Florida state court's injunction against Data Lease (R. 14 582 Exh. C; R 24 985 Exh. A). Data Lease thereupon applied for permission from the Florida Supreme Court to enter into such an agreement, and that permission was denied. *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.*, 328 So.2d 825 (Fla. 1975).

its own statement of facts, and is without precedent in its suggestion that "uncertainties of law" or the "legality" of a contract are not the proper subjects for a Rule 56 motion for summary judgment.

Additionally, the panel misapprehended the following pertinent facts:

1. The panel opinion at 4813 overlooked the fact that Data Lease abandoned its bailment and conversion claims by failing to take issue with the disposition below on the merits (*Compare* Opinion at 4813 *and* R. 23 965 14-19; R. 25 1001 4-5).

2. The panel opinion at 4821 n. 16 overlooks the *stipulation* of the parties (R. 24 978 10) and the disposition below on the merits of the good faith issue (R. 25 1001 11).

3. The panel opinion at 4822 n. 18 incorrectly states that Data Lease raised the affirmative defense of accord and satisfaction (*See* R. 4 160 Exh. A).

4. The panel opinion at 4822 incorrectly states that the parties *substituted* a new contract for the original pledge agreement (*See, e.g.*, Data Lease's Fifth Affirmative Defense, R. 4 160 Exh. A at 11).

5. The panel opinion at 4822 incorrectly states that the "turnover agreement" was intended to replace a *majority* of the Miami National board (*Compare* Statement of Facts in Opinion at 4811).

6. The panel opinion at 4815 incorrectly determined that Data Lease's injury was different

from that of other shareholders (R. 18 763 6; *see also* Opinion at 4811 (noting in the Statement of Facts that the injury was a dramatic decline in the value of the Miami National stock)).

CONCLUSION

The district court's decision, based on the full record developed in this case since 1978, took into account all of the foregoing elements. The panel's opinion misapprehends both facts and law, and departs radically from binding precedent of this circuit, including *Empire* and the recent Supreme Court cases on summary judgment. For these reasons, the panel's opinion should not become the law of this circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY THAT a true and correct copy of the foregoing was served by first class mail this 19th day of October, 1987, upon all counsel of record as follows:

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MEDIOCREDITO REGIONALE DELLA CALABRIA
MEDIOCREDITO REGIONALE DELLA LOMBARDO
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MERIDIA LEASING S.P.A.
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MICROGEN HOLDINGS P.L.C.
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M4 DATA LIMITED
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SCI BEAUMANOIR II — AIX EN PROVENCE
SCI BEAUVAIS — SAINT QUENTIN
SCI BEL OMBRE I
SCI BERTRAND SAINT-MAUR
SCI BOULOGNE JUIN BELLEVUE
SCI BROTTEAUX GARIBALDI
SCI BUC LES YVELINES
SCI BURES SUR YVETTE-FONTAINE ST. MATHIEU
SCI CAMPAGNE DES TROIS MOULINS
SCI CANNES BEACH
SCI CHAMPIONNET VAUVENARGUES
SCI CHOISY AU BAC — LE HAMEAU DE LAIGUE
SCI CITES REPUBLIQUE
SCI CLEMENCEAU VALIOUD
SCI CLINIQUE PARIS QUEST
SCI CLINIQUE SAINT MAUR
SCI DE DISTRIBUTION ROUTIERE
SCI DE L'AVENUE BERGER
SCI DE L'IMPASSE DU BUREAU
SCI DE LA PLACE CHARLES DULLIN

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SCI DENAIN VILLARD
SCI DES ESTABLISSEMENTS FINANCIERS
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SCI DES 12 ET 28 RUE BRANDIS
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SCI EAUBONNE LECLERC
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SCI GARIBALDI PART DIEU
SCI GRANDS CHAMPS 1972

SCI JACQUES HEBERT SAINT ELOI
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SCI JEAN JAURES ROMAN
SCI LA GRANDE JATTE
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SCI LE SALION
SCI LE LOUVAIN
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SCI LE MEDITERRANEE
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SCI LE PARC D'ALIGRE
SCI LE PARC D'ALIGRE
SCI LE PARC DE LA CAMILLE II
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SCI LES RESTANQUES
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Supreme Court, U.S.
FILED
JAN 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-941

In the Supreme Court of the United States

OCTOBER TERM, 1987

CITIBANK, N.A.,
Petitioner,

vs.

DATA LEASE FINANCIAL CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PREFACE

The parties will be referred to by their proper names. The following symbol will be used:

A—Petitioner Citibank's Appendix.

STATEMENT OF THE CASE

Citibank's statement of the case is incomplete. The facts, which must be reviewed in a light most favorable to Data Lease since this was an appeal from a summary judgment, are accurately set forth in the opinion of the Eleventh Circuit.

Citibank held, as collateral for a loan to Data Lease, 80% of the capital stock of Miami National Bank. When the loan went into default, Citibank represented to Data Lease that if Data Lease would relinquish control to Citibank, Citibank would assist Miami National in obtaining deposits and loans, and would furnish banking experts to improve the bank's performance. Data Lease relinquished control to Citibank, and Citibank installed new directors and management, making Joseph Stefan chairman of the board and president (A 21). Stefan, who later was convicted of criminal misconduct as a result of his management of Miami National, testified that Citibank put him there and that, while running Miami National, he really was working for Citibank (A 15, 30, n.17).

Miami National lost millions on "a disastrous series of loans." Citibank had refused "out of hand" to make those loans, but recommended Miami National make them. The Citibank officer who turned these loans down told Data Lease it had no reason to be concerned about the fact that Miami National made the loans. One of the Miami National directors who had been installed by Citibank misrepresented to Data Lease that the loans had been approved by the comptroller of currency and that Miami National's liability was minimal (A 22).

As a result of the dramatic decline in value of Miami National stock, Data Lease brought these claims against Citibank and the Citibank-controlled directors of Miami National.

SUMMARY OF ARGUMENT

The Eleventh Circuit reversed a summary judgment entered in favor of Citibank and the Miami National

directors because there was evidence from which a jury could find that Citibank controlled the directors of Miami National and could therefore be liable for the directors' mismanagement of Miami National. Citibank argues it cannot be liable because under the National Bank Act the directors are solely responsible for running a national bank. There is nothing in the National Bank Act which makes the directors solely responsible. Even if there was, the fact that Citibank and the directors of Miami National may have been violating the National Bank Act would not absolve Citibank of liability for the misconduct of its agents.

Citibank, in attempting to show conflict, misconstrues the holding of *Empire Life Insurance Company of America v. Valdak Corporation,* 468 F.2d 330 (5th Cir. 1972). Citibank says *Empire* requires intentional depreciation of the stock of Miami National in order to make the directors amenable to suit by Data Lease. This argument fails for two reasons. First, as Citibank recognizes in footnote 2 on page 3, Data Lease alleged fraud and conversion, as well as negligence, against the directors of Miami National. In addition there were RICO claims. The Eleventh Circuit, in reversing the summary judgment, reinstated all of these claims which allege intentional misconduct. Nor does Citibank's argument that *Empire* requires intentional misconduct have merit. The issue in that case was whether an individual shareholder could sue the directors or whether recovery could only be sought by a derivative suit. In *Empire* the misconduct happened to be fraud and that is why the Fifth Circuit characterized it as intentional. The opinion did not limit the right to recover to intentional misconduct.

ARGUMENT

I. The Eleventh Circuit's Decision Does Not Conflict With the National Bank Act.

The National Bank Act is not even mentioned in the opinion of the Eleventh Circuit, and it only merited a footnote in Citibank's 15-page motion for rehearing in the Eleventh Circuit (A 93). Nor is there anything in the National Bank Act which would prohibit Citibank from being held responsible for the negligence or intentional misconduct of the directors of Miami National, who were installed by Citibank and acting as its agents. Citibank's illogical argument is that it would be improper for the directors of Miami National to be under the control of Citibank, and therefore Citibank cannot be liable for their misconduct, even if it did in fact control them.

The Eleventh Circuit did not hold that the directors of a national bank are not responsible for the management of the bank. The Eleventh Circuit merely held that since there was evidence that the directors of Miami National were not independent, and were being controlled by Citibank, there were issues of fact which precluded a summary judgment for Citibank.

Citibank says at the top of page 10 that the National Bank Act makes it clear that the directors of Miami National were "solely responsible for the bank's management." Citibank misrepresents, by omitting a few words, and inserting a word of its own, the provision of the National Bank Act on which it relies. 12 U.S.C.A. § 71 (West Supp. 1987), says:

> The affairs of each association shall be managed by not less than five directors who shall be elected

> by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking; and afterward at meetings to be held on such day of each year as is specified therefor in the bylaws. The directors shall hold office for one year and until their successors are elected and have qualified.

There is nothing in the National Bank Act which limits the liability for mismanagement to the directors.

Nor does the Florida law on agency conflict with the National Bank Act. It is clear from the opinion of the Eleventh Circuit that the agency law it relied on is nothing more than basic principles found in the Restatement (Second) of Agency § 1 (1958) to the effect that an agency relationship results where there is an agreement that one person shall act under the control of and on behalf of another.

Citibank argues on page 10 it had no right to supervise or control the directors of Miami National. Citibank did control them, however, regardless of whether it had the legal right to do so. The Eleventh Circuit quoted the testimony of the chairman and president of Miami National, Joseph Stefan, who testified that "at the bottom of everything" he was working for Citibank when he was running Miami National (A 15).

The portion of the opinion of the Eleventh Circuit involving the liability of Citibank for the conduct of the directors of Miami National is based on simple principles of agency. Citibank's argument that it could not be liable for controlling the directors of Miami National, because

this would be illegal, is without merit. There is no conflict with the National Bank Act.

II. The Eleventh Circuit's Opinion Does Not Conflict With a Decision of the Fifth Circuit.

Citibank argues that in the present case the Eleventh Circuit created conflict with *Empire Life Insurance Company of America v. Valdak Corporation,* 468 F.2d 330 (5th Cir. 1972), because in the present case the Eleventh Circuit held that there need not be intentional misconduct to depreciate the value of the stock in order for the pledgee to be liable.

Even if *Empire* required intentional misconduct, which it does not, there was intentional misconduct alleged in the present case. Citibank recognizes in footnote 2 on page 3 that Data Lease alleged fraud and conversion against the directors. There were also RICO claims. This is all clear from the opinion of the Eleventh Circuit. There is no relevant distinction between the misconduct alleged in the present case and that in *Empire.*

Nor did *Empire* hold that the pledgee of stock may not be held liable unless there is a specific intent to depreciate the value of the collateral. In *Empire* the Fifth Circuit stated on page 335:

> Defendant here alleges that plaintiff's acts not only violated its fiduciary duty to National but further violated its duty as pledgee not to deplete the value of the collateral intentionally. As a general proposition, the law implies a duty in the pledgee of stock to preserve the value of any collateral held by him to secure a loan. . . .

In *Empire* the conduct which caused the value of the stock to be lowered happened to be fraud and that is why the court used the word intentional. The issue in *Empire,* and in this case however, was whether the pledgor could proceed directly against the pledgee, instead of having to bring a derivative suit. In the present case the Eleventh Circuit stated:

> The issue in *Empire Life* was whether the pledgor could proceed directly against the pledgee. The issue in the present case is whether a pledgor can proceed directly against third parties whom the pledgee has installed on a corporation's board of directors. Nevertheless, we think that whenever a pledgee of stock installs its agents on the board of directors, these agents owe the pledgor the same direct duty as the pledgee. . . . (A 19).

The facts on which the cause of action was based in *Empire* occurred before Texas adopted the U.C.C. and the Fifth Circuit noted on page 334 that greater misconduct was required for recovery against the pledgee prior to the adoption of the U.C.C., than was required after it became law. Section 9-207 of the U.C.C., which is applicable in the present case, imposes on Citibank a duty of reasonableness.

It is thus clear that intentional misconduct is not required for recovery against the pledgee, but even if it was required, there was ample evidence of it in this record. *Empire* is on all fours with the present case, and the Eleventh Circuit properly construed and applied *Empire* to these facts.

CONCLUSION

The petition for writ of certiorari should be denied.

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FILED
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Miami Herald, Jan. 17, 1988, at 10F, col. 4	3

No. 87-941

In the Supreme Court of the United States

OCTOBER TERM, 1987

CITIBANK, N.A.,

Petitioner,

v.

DATA LEASE FINANCIAL CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For The Eleventh Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Data Lease's unsupported contention that an individual or entity other than a national bank's board of directors can be ultimately responsible for the bank's management is belied by the National Bank Act and decisions of this Court. Public confidence in national banks depends upon director accountability for bank management. The Eleventh Circuit's decision, which dis-

regards the Act, and rests on inapplicable state law, will dilute director accountability and undermine public confidence in national banks.

The Eleventh Circuit's opinion also is in direct conflict with the Fifth Circuit's opinion in *Empire Life Insurance Co. of America v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972), because it suggests that a mere showing of negligence is sufficient for Data Lease's claim under the Uniform Commercial Code ("U.C.C."). Despite Data Lease's assertion to the contrary, it is clear that under *Empire* a *specific intent* to deplete the value of stock collateral is essential to Data Lease's claim. Certiorari therefore should be granted and the Eleventh Circuit's opinion should be reversed.[1]

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[1]Data Lease's statement of the case contains factual misstatements, the most egregious of which must be addressed. There is no support, in the record or elsewhere, for Data Lease's statement that Citibank recommended that Miami National Bank make a series of bad loans that precipitated a decline in the bank's value. Notably, Data Lease does not provide any citation to the record to support its assertion. Citibank could not, and did not, direct the management or the day-to-day affairs of Miami National Bank, but merely exercised its rights under the pledge agreement with Data Lease to vote the pledged shares. The comment of director Stefan that "at the bottom of everything" he worked for Citibank merely reflected the fact that Citibank had the right to vote to maintain him or to remove him from office.

ARGUMENT

I. The Eleventh Circuit's Opinion Conflicts with the National Bank Act.

The National Bank Act vests the board of directors of a national bank with the authority and ultimate responsibility to manage the bank. 12 U.S.C.A. §§ 24, 71 (West Supp. 1987). This Court has made it clear that national bank directors may not officiate as "figure-heads" and cannot be absolved of their ultimate responsibility for bank management. *Briggs v. Spaulding,* 141 U.S. 132, 165 (1891). The Eleventh Circuit's conclusion that a pledgee of 80% of a bank's stock, which votes that stock to elect directors, may be held ultimately responsible for the management of the bank is untenable under the Act and ignores a basic principle of the corporate form.

The Eleventh Circuit's decision will undermine the public policy, embodied in the Act, of promoting public confidence in national banks by making directors strictly accountable for bank management. This policy is especially important as confidence in financial institutions is shaken by the recent high rate of bank failures.[2] *See Prudential Trust Co. v. Brown,* 271 Mass. 132, 171 N.E. 42, 44-45 (1930) (bank directors "invite the confidence of the depositing public and must afford the protection thereby implied"). In *Gibbons v. Anderson,* 80 F. 345 (W.D. Mich. 1897), the court, interpreting decisions of this Court, noted the rationale for vesting ultimate responsibility for

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[2]More banks failed in 1987 than in any year since the Great Depression. Miami Herald, Jan. 17, 1988, at 10F, col. 4.

management in the directors and the impact upon public confidence if the law were otherwise:

> How . . . would any national bank have the confidence of its depositors . . . if it were given out that these directors whose names so often stand at the head of its business cards . . . [were merely] makeweights in its solicitation for business . . . .

Id. at 350.

Public confidence in the operation of national banks is a key purpose of the statutory framework relating to directors. Congress has promulgated strict standards for membership to a national bank's board of directors, and bank directors are charged with heightened fiduciary duties to the bank's depositors and shareholders. *See* 12 U.S.C.A. §72 (West Supp. 1987); 12 U.S.C.A. §73 (West 1945); *see, e.g., Lane v. Chowning,* 610 F.2d 1385 (8th Cir. 1979). Additionally, the Act holds bank directors ultimately accountable by granting a statutory right of action to persons damaged by a director's breach of his duties. 12 U.S.C.A. §93(a) (West Supp. 1987). The Eleventh Circuit's opinion contradicts the plain language of the Act and undermines the policy behind it by diluting the accountability of directors.

The Eleventh Circuit's application of state law agency principles incorrectly ignores the supervening principles of the Act.[3] Moreover, the law applied by the Eleventh Circuit was incorrect. Although an agency rela-

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[3]Oddly, Data Lease's brief implies that the provisions of the Act were not an important part of the proceedings below. On the contrary, they were key to the threshold issue determined by the district court. A-41, A-60. The Eleventh Circuit, however, erroneously ignored the Act's provisions and applied general state law to reverse the district court's opinion.

tionship may be created by agreement, there can be no agency relationship where a statute requires one personally to perform an act. *See, e.g., Connecticut v. Tedesco*, 175 Conn. 279, 397 A.2d 1352 (1978). The National Bank Act required Miami National Bank's board to manage Miami National Bank; the board members therefore could not have been Citibank's agents in managing the bank.

II. The Eleventh Circuit's Opinion Is In Direct Conflict With The Fifth Circuit's Opinion In *Empire*.

Data Lease's suggestion that specific intent is not an essential element under the *Empire* decision, and that mere negligence suffices, is astonishing. In *Empire*, the Fifth Circuit specifically recognized that a pledgee of stock does not violate its duty to the pledgor with respect to the underlying value of the stock collateral "if the stock held in pledge suffered a loss in value through negligence of the pledgee . . . through ill-advised or negligent voting of . . . stock . . . ." *Id.* at 335 (quoting *Ritchie v. McMullen*, 79 F. 522 (6th Cir.), *cert. denied*, 168 U.S. 710 (1897)).

The Eleventh Circuit determined that a claim would lie for loss in the underlying value of the pledged stock if there was evidence which indicated that the pledgee "install[ed] and maintain[ed] incompetent individuals in positions of management" or "blithely allowed these individuals to deplete the value of the pledged collateral." A-28-29. The failure to require a *specific intent* by the pledgee to deplete the value of the collateral places the Eleventh Circuit's decision in direct conflict with the Fifth Circuit's decision in *Empire*.

Data Lease argues that even if *Empire* requires "intentional misconduct," there is no conflict with the Eleventh Circuit's decision because Data Lease's as-

serted claims for fraud and conversion, which are intentional torts. The argument is without merit. *Empire* does not permit a cause of action for any alleged intentional misconduct arising in connection with a pledge relationship. The cause of action is limited to instances in which "[the] pledgee use[s] his position . . . as stockholder intentionally to depreciate the stock of his pledgor . . . with the dishonest purpose of acquiring ownership of the stock at forced sale." *Id.* at 336. There is a clear distinction between a laundry list of alleged intentional acts and an allegation that these acts were performed with the specific intent to depreciate the pledged stock.

Additionally, Data Lease incorrectly suggests no conflict exists because the Fifth Circuit applied a rigorous pre-Code evidentiary standard inapplicable under the U.C.C. The more rigorous evidentiary standard referred to by Data Lease was limited to that utilized to determine the validity of foreclosure sales. *Id.* at 333-34. The standard applied to determine whether a pledgee has violated his duty of care remains the same in both pre-Code and U.C.C. cases. *See, e.g., FDIC v. Webb*, 464 F. Supp. 520, 526 (E.D. Tenn. 1978) ("[U.C.C. §9-207] does not alter but merely restates the common law rule"); U.C.C. §9-207, comment 1 (1978).

The Eleventh Circuit's opinion directly conflicts with the Fifth Circuit's opinion in *Empire*. Accordingly, certiorari should be granted.

CONCLUSION

For the reasons asserted herein, and in Citibank's petition for certiorari, a writ of certiorari should be granted by this Court to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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